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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 147

GEORGIA,

*Petitioner,*

—v.—

THOMAS RACHEL, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENTS

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In the

# Supreme Court of the United States

October Term, 1965

No. 147

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Georgia,

*Petitioner,*

—v.—

Thomas Rachel, *et al.*,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR RESPONDENTS

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### Opinions Below

The opinions below are appropriately referred to in Georgia's Brief (Br. 1-2). The opinion supporting the judgment here for review is reported as *Rachel* v. *Georgia*, 342 F. 2d 336 (5th Cir. 1965) (R. 20). Rehearing was denied at 343 F. 2d 909 (5th Cir. 1965) (R. 51).

### Jurisdiction

The grounds on which the jurisdiction of this Court rests are appropriately stated in the first paragraph and the first sentence of the second paragraph of the section titled "Jurisdiction" in Georgia's Brief (Br. 2). This Court might

also review the remand order of the district court (R. 5-9) as on petition for an original writ of mandamus directed to that court. 28 U. S. C. §1651 (1964); *Ex parte Peru*, 318 U. S. 578 (1943). Should this Court deem the exercise of the latter jurisdiction appropriate, respondents respectfully request that the Court consider this Brief as a petition for mandamus, together with a motion for leave to file the petition. See pp. 34-35 *infra*.

## Constitutional Provisions, Statutes and Rules Involved

1. The case involves the Supremacy Clause, Art. VI, cl. 2, of the Constitution of the United States and the Fourteenth Amendment to the Constitution.

2. The following statutes and rules are also involved:

**28 U. S. C. §1443 (1964):**

§1443. *Civil rights cases.*

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refus-

ing to do any act on the ground that it would be inconsistent with such law.

**28 U. S. C. §1446(a) (1964):**

§1446. *Procedure for removal.*

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

**28 U. S. C. §1447(d) (1964) (as amended by Civil Rights Act of 1964, Pub. L. 88-352, §901, 78 Stat. 266):**

§1447. *Procedure after removal generally.*

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

**Civil Rights Act of 1964, Pub. L. 88-352, §§201, 203, 78 Stat. 243-244, 42 U. S. C. §§2000a, 2000a-2 (1964):**

§2000a. *Prohibition against discrimination or segregation in places of public accommodation.*

(a) *Equal access.*

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) *Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.*

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) *Operations affecting commerce; criteria; "commerce" defined.*

The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers of [sic] a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances [,] athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Colum-

bia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) *Support by State action.*

Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) *Private establishments.*

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section. (Pub. L. 88-352, title II, §201, July 2, 1964, 78 Stat. 243.)

§2000a-2. *Prohibition against deprivation of, interference with, and punishment for exercising rights and privileges secured by section 2000a or 2000a-1 of this title.*

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any persons of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten,

or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title. (Pub. L. 88-352, title II, §203, July 2, 1964, 78 Stat. 244.)

**Ga. Code Ann. §26-3005 (1965 Cum. Supp.):**

26-3005. *Refusal to leave premises of another when ordered to do so by owner or person in charge.*—It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1960, p. 142.)

**Fed. Rule Crim. Pro. 37(a)(2):**

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare

and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

**Order of this Court, February 8, 1946, prescribing Rule 37(a)(2), 327 U. S. 825:**

IT IS ORDERED on this eighth day of February, 1946, that the annexed Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119, as amended (47 Stat. 904; U. S. Code, Title 18, §688) for the District Courts of the United States, the United States Circuit Courts of Appeals, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States, and that said Rules shall become effective on the twenty-first day of March, 1946.

IT IS FURTHER ORDERED that these Rules and the Rules heretofore promulgated by order dated December 26, 1944, governing proceedings prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, shall be consecutively numbered as indicated and shall be known as the Federal Rules of Criminal Procedure.

FEBRUARY 8, 1946.

## Questions Presented

I. Whether the court of appeals had jurisdiction to review an order of the district court remanding to the appropriate state court state criminal cases removed pursuant to 28 U. S. C. §1443 (1964) where notice of appeal was filed sixteen days after the date of the remand order.

II. Whether a removal petition which alleges that the petitioners are being prosecuted on state criminal trespass charges for their conduct in attempting to obtain equal service without racial discrimination in restaurants covered by the public accommodations title of the Civil Rights Act of 1964 thereby states a case for removal under 28 U. S. C. §1443 (1964).

III. Whether, as a matter of pleading, respondents' removal petition sufficiently alleges that they are being prosecuted on state criminal trespass charges for their conduct in attempting to obtain equal service without racial discrimination in restaurants covered by the public accommodations title of the Civil Rights Act of 1964.

IV. Whether the court of appeals properly directed the district court, in remanding the case to it for hearing on the allegations of the removal petition, to assume jurisdiction if it were proved that respondents had been arrested and charged for seeking service which was denied them "for racial reasons" at the places of public accommodation named in their petition.

## Statement of the Case

February 17, 1964, the twenty respondents (hereafter called defendants as they were in the district court) filed in the United States District Court for the Northern District of Georgia their petition for removal of state criminal trespass charges pending against them for trial in the Superior Court of Fulton County, Georgia (R. 1-5). The petition alleged that defendant Rachel and seven other defendants "were arrested on June 17, 1963 when they sought to obtain service, food, entertainment and comfort at Lebco, Inc., d/b/a Leb's, a privately owned restaurant opened to the general public, 66 Luckie Street, Atlanta, Fulton County, Georgia" (R. 2). The remaining defendants were arrested at Leb's on other dates in May or June of 1963, or at one of four other restaurants, cafeterias or hotels opened to the general public on dates between March and June of 1963 (R. 2-3). Each establishment where arrests were made was identified in the petition by name and street location in the city of Atlanta (R. 2-3), except that no street location was recited for the Henry Grady Hotel, which was alleged to be "built on real estate owned by the State of Georgia but leased for a term of years to the H. & G. Hotel Corporation" (R. 3). Several of the defendants were arrested in attempts to obtain service at more than one of these establishments and/or on more than one date (R. 2-3). "[T]heir arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and con-

venience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race" (R. 1-2). Each defendant was subsequently indicted under Georgia's 1960 criminal trespass statute, GA. CODE ANN. §26-3005 (1965 Cum. Supp.), penalizing refusal to leave premises on request of the owner (see p. 7 *supra*) (R. 3-4).

Prosecutions growing out of these arrests and indictments were sought to be removed to the federal court under authority of 28 U. S. C. §§1443(1), (2) (1964), p. 2 *supra* (R. 4), "to protect the rights guaranteed . . . under the due process and equal protection clauses of [the] . . . Fourteenth Amendment . . . and to protect the right of free speech, association and assembly guaranteed by the First Amendment . . . " (R. 4). It was alleged that the defendants were prosecuted for acts under color of authority derived from the federal Constitution and laws (R. 4), and that they were denied and could not enforce in the Georgia courts their rights under federal law providing for equal rights, "in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination" (R. 4).

February 18, 1964, District Judge Boyd Sloan, *sua sponte* and without hearing, remanded the prosecutions to the Superior Court of Fulton County (R. 5-9). March 5, 1964, defendants filed a notice of appeal from that order (R. 9). March 12, they filed in the Court of Appeals for the Fifth Circuit a motion for a stay of the remand order (App. 1a-3a, *infra*). The same day, Georgia filed a motion to dismiss

the appeal (R. 10-13). That date, March 12, 1964, the court of appeals granted defendants' motion for a stay and postponed the disposition of Georgia's motion to dismiss until hearing on the merits (R. 13-14). Georgia thereupon moved this Court for leave to file a petition for prerogative writs, commanding the judges of the court of appeals to vacate their stay order and proceed no further with the appeal. June 22, 1964, the Court denied the motion without opinion. *Georgia* v. *Tuttle*, 377 U. S. 987 (1964).*

July 2, 1964, the Civil Rights Act of 1964 was enacted into law. Pub. L. 88-352, 78 Stat. 241. December 14, 1964, this Court held in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), that sections 201 and 203 of that act, portions of the public accommodations title, see pp. 3-7 *supra*, precluded state criminal trespass conviction of sit-in demonstrators who had refused to leave covered establishments from which they were ordered for racial reasons, even though the sit-ins occurred, and their prosecutions had been instituted, prior to the effective date of the 1964 act. March 5, 1965, the court of appeals rendered its opinion and judgment in the present case, reversing the remand order of the district court (R. 20-36). Sustaining its appellate jurisdiction under 28 U. S. C. §1447(d) (1964), as amended by section 901 of the Civil Rights Act of 1964, 78 stat. 266, the court held that defendants' removal petition adequately alleged that their prosecutions were in violation of sections 201 and 203 of the act as construed in *Hamm*. The court concluded that, if these allegations were true, criminal prosecution of defendants in the Georgia courts denied them their rights

* For the events leading up to this prerogative writ proceeding, see the documents in the Appendix to Brief for Respondents Rachel et al., *Georgia* v. *Tuttle*, 377 U. S. 987 (1964), pp. 24-51.

under §§201 and 203, and made them unable to enforce these rights, within the meaning of the civil rights removal statute's first subsection, 28 U. S. C. §1443(1). Without reaching any question of the removal petition's sufficiency under §1443(2), the court of appeals therefore remanded the case to the district court for hearing, instructing the district court to give the defendants "an opportunity to prove the allegations in the removal petition as to the purpose of the arrests and prosecutions, and in the event it is established that the removal of the [defendants] . . . from the various places of public accommodations was done for racial reasons, then under authority of the *Hamm* case," to accept removal jurisdiction and dismiss the prosecutions (R. 31-32). Georgia's petition for rehearing *en banc* (R. 37-49) was denied April 19, 1965 (R. 51), and this Court granted Georgia's petition for certiorari October 11, 1965 (R. 52).

## Summary of Argument

### I.

The court of appeals did not lack jurisdiction to review the remand order by reason of untimeliness in filing defendants' notice of appeal. The notice was timely filed. The ten-day appeal period limited by FED. RULE CRIM. PRO. 37(a)(2) was prescribed under this Court's post-verdict criminal rule-making power and, by the terms of the order prescribing it, has no application to appeals before verdict in criminal cases.

Even were Criminal Rule 37(a)(2) applicable, the court of appeals had jurisdiction to proceed as on petition for mandamus, without limitation of time. The prerogative writ

is the traditional and accepted mode of review of remand orders, and section 901 of the Civil Rights Act of 1964 preserves it as an alternative to appeal. The court of appeals had the power to treat the present proceeding as before it on petition for the writ. Should its appellate jurisdiction be held wanting, the case ought to be remanded to that court for its determination whether to entertain it as a prerogative writ proceeding.

However, this Court need not decide any question of the jurisdiction of the court of appeals in order to reach the significant and pressing question of removability which the case presents. The Court might review the remand order of the district court as on an original petition for mandamus to that court. The importance of expeditious construction of the civil rights removal statute justifies the exercise of the Court's discretion to so proceed.

## II.

Persons criminally prosecuted for attempts to obtain desegregated restaurant service in the exercise of their equal civil rights under the public accommodations title of the Civil Rights Act of 1964 are thereby denied these rights, and made unable to enforce them, within the meaning of 28 U. S. C. §1443(1). Pending prosecution constitutes intimidation and punishment forbidden by section 203 of the 1964 act and an impermissible repression of the right to restaurant service free of racial discrimination given by section 201. Federal removal jurisdiction is required to protect this right from destruction by mesne process during the delays incident to state court criminal proceedings. Therefore, persons prosecuted may sustain removal under §1443(1) without inquiry into the questions whether the

state statute under which they are charged is unconstitutional on its face or whether the state courts will not fairly entertain their federal defenses. The former inquiry is required by the decisions of this Court only where federal procedural rights, not where federal substantive rights, are implicated in the state prosecution. The latter inquiry is entirely impracticable, and is never required under §1443(1).

Persons prosecuted for the exercise of their right to equal public accommodations under the Civil Rights Act of 1964 are also thereby prosecuted for an act under color of authority derived from the 1964 legislation, within the meaning of 28 U. S. C. §1443(2). The legislative history of §1443(2) and its context in the present Judicial Code indicate that its protection is available to private individuals, not merely to federal officers and those acting under them. As applied to private individuals, "color of authority" derived from civil rights law means the license to act which these laws give, free of every sort of repression. In no other sense do federal civil rights laws give authority to private conduct.

Narrow construction of the civil rights removal jurisdiction would defeat the great purpose of the Reconstruction Congresses to extend effective federal judicial protection to the civil liberties which the post-war Amendments guaranteed. The liberties secured by these Amendments and by federal civil rights legislation are perpetually in jeopardy so long as state criminal proceedings may be used to harass the individuals who dare exercise them. The civil rights removal jurisdiction is a needed shield against such harassment.

## III.

Defendants' removal petition was not deficient as a pleading. It sufficiently alleged each of the three elements required for removal under a proper construction of 28 U. S. C. §1443: that defendants were (1) prosecuted for criminal trespass for refusal to leave (2) places of public accommodation covered by the Civil Rights Act of 1964, (3) where they were ordered out and then arrested by reason of racial discrimination.

## IV.

The court of appeals properly directed the district court, in remanding the case to it for hearing on the allegations of the petition, to determine whether the trespass charges against defendants arose from their refusals to leave places of public accommodation which they were ordered to leave for racial reasons. Such a showing brings defendants within the protection of the public accommodations sections of the Civil Rights Act of 1964, hence of the removal statute. Georgia does not and cannot seriously contest coverage of the restaurants in question under the 1964 act, and the attack made on the foreclosing of other issues on remand demonstrates only Georgia's misconstruction of the removal statute or the court of appeals' opinion.

## ARGUMENT

### I.

### The Court of Appeals Did Not Lack Jurisdiction of the Appeal by Reason of Asserted Untimeliness in Filing the Notice of Appeal.

Because defendants' notice of appeal, March 5, 1964 (R. 9), was filed more than ten days after the district court's order of February 18, 1964 (R. 5-9) remanding their prosecutions to the state trial court, Georgia urges that the court of appeals lacked jurisdiction to entertain any proceeding by defendants for review of that order (Br. 13-29). The argument is that these removed prosecutions are criminal proceedings (Br. 21); that the Federal Rules of Criminal Procedure apply to them by virtue of Rules 54(b)(1) and 59 (Br. 21-28); that therefore the ten-day appeal period of Rule 37(a)(2) governs the case (Br. 13-21); and that failure to file a notice of appeal within the ten-day period is fatal to the jurisdiction of the court of appeals (Br. 29). Defendants have no controversy with any but the essential part of this. They agree that their prosecution is criminal, that the Federal Criminal Rules govern it at every stage subsequent to the perfection of federal removal jurisdiction by filing and service of their removal petition (see 28 U. S. C. §1446(e) (1964)) on February 17, 1964 (R. 1-5), and that any applicable appeal period fixed by those rules goes to the jurisdiction of the circuit court. They share the view of that court, however, that the ten-day period of Rule 37(a)(2) does not apply to pre-verdict appeals in any criminal case, removed or original, governed by the Criminal Rules. And they assert, in any event, that the court

of appeals clearly had jurisdiction to review the remand order by prerogative writ, unencumbered by the time limited by any rule governing appeal.

**A. As Rule 37(a)(2) Has No Application to Pre-Verdict Appeals, the Notice of Appeal Was Timely Filed.**

This Court's power to make rules governing practice and procedure in federal criminal proceedings derives from two distinct sources. By the Act of February 24, 1933, ch. 119, §1, 47 Stat. 904, amended by the Act of March 8, 1934, ch. 49, 48 Stat. 399, the Court was authorized to promulgate "rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases. . . ." That authority is presently codified, substantially unchanged, in 18 U. S. C. §3772 (1964), as amended.[1] Rules

[1] The 1933 act authorized rule-making with respect to proceedings "after verdict." Its 1934 amendment expanded the authority to proceedings "after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty," apparently for the reason that no distinction seemed justified in post-conviction rules for jury-tried and jury-waived cases. See *Nye* v. *United States*, 313 U. S. 33, 44 (1941). The *Nye* case held that this language failed to reach proceedings for criminal contempt. Congress responded by the Act of November 21, 1941, ch. 492, 55 Stat. 779, extending the 1933 authorization to criminal contempt cases. These three statutes were the basis for present 18 U. S. C. §3772, enacted in the criminal code revision of 1948. Act of June 25, 1948, ch. 645, 62 Stat. 846-847. (The revisers' note also mentions the Act of June 7, 1934, ch. 426, 48 Stat. 926, and the Act of June 25, 1936, ch. 804, 49 Stat. 1921, which changed the names of the trial and appellate courts in the District of Columbia; the 1948 revision itself made some other changes in phraseology but none in substance. See H. Rep. No. 304, 80th Cong., 1st Sess. A177-A178 (1947).) Section 3772 was amended by the Act of May 24, 1949, ch. 139, §60, 63 Stat. 98, to correct the nomenclature of several courts and a typographical error, see H. Rep. No. 352, 81st Cong., 1st Sess. (1949), 2 U. S. Code Cong. Serv., 81st Cong., 1st Sess., 1949, 1264; amendments in 1958 and 1959 merely accommodated

announced under it (which we may call in shorthand "post-verdict rules") become effective without submission to Congress. By the Act of June 29, 1940, ch. 445, 54 Stat. 688, the Court was authorized to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases . . . ." This second authority is presently codified, substantially unchanged, in 18 U. S. C. §3771 (1964), as amended.[2] Rules announced under it (which we may call in shorthand "pre-verdict rules") become effective only upon submission to Congress.

The Court first exercised its post-verdict rule-making authority by an order dated May 7, 1934 which explicitly invoked the 1933-1934 legislation, see 292 U. S. 661, in adopting eleven rules "as the Rules of Practice and Pro-

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the admission to statehood of Alaska and Hawaii respectively. Act of July 7, 1958, Pub. L. 85-508, §12(1), 72 Stat. 348; Act of March 18, 1959, Pub. L. 86-3, §14(h), 73 Stat. 11.

[2] The Act of November 21, 1941, ch. 492, 55 Stat. 779, extended the pre-verdict 1940 authorization, as well as the post-verdict 1933 authorization, to criminal contempt cases. See note 1 *supra*. The 1940 and 1941 acts were codified in 1948 as 18 U. S. C. §3771. Act of June 25, 1948, ch. 645, 62 Stat. 846; see H. Rep. No. 304, 80th Cong., 1st Sess. A-177 (1947). The Act of May 24, 1949, ch. 139, §59, 63 Stat. 98, made some changes in judicial nomenclature and authorized transmission of the rules to Congress by the Chief Justice instead of by the Attorney General as theretofore, see H. Rep. No. 352, 81st Cong., 1st Sess. (1949), 2 U. S. Code Cong. Serv., 81st Cong., 1st Sess., 1949, 1264. The Act of May 10, 1950, ch. 174, §1, 64 Stat. 158 altered the time at which the rules might be submitted to Congress and the period after submission when they were to take effect. Acts in 1958 and 1959 amended language in the section to accommodate the admission to statehood of Alaska and Hawaii respectively. Act of July 7, 1958, Pub. L. 85-508, §12(k), 72 Stat. 348; Act of March 18, 1959, Pub. L. 86-3, §14(g), 73 Stat. 11.

cedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases . . . ." *Ibid.* Rule III, governing appeals, prescribed that appeal should be "taken within five (5) days after entry of judgment of conviction" (except where a motion for new trial was pending), abolished petitions for allowance of appeal and citations, provided that appeal should be taken by filing a notice of appeal in duplicate in the district court and serving it on the government, and described its contents. 292 U. S. 662-663. In 1946, by order dated February 8, the Court prescribed Rules 32 to 39 of the new Federal Rules of Criminal Procedure, effective March 21, 1946. 327 U. S. 821, 825. It was thereby ordered that these "Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119, as amended (47 Stat. 904, U. S. Code, Title 18, §688)." 327 U. S. 825. Rule 37(a)(2) prescribed that appeal by a defendant should be "taken within 10 days after entry of the judgment or order appealed from" (unless a motion for new trial or in arrest of judgment was pending), required the court to advise an unrepresented defendant of his right to appeal following sentence after trial and the clerk to prepare and file a notice of appeal on request of such a defendant, and prescribed that an appeal by the government when authorized by statute should be "taken within 30 days after entry of the judgment or order apealed from." 327 U. S. 857-858. Rule 37(a)(1) provided that appeal should be taken by filing a notice of appeal in duplicate in the district court, described its form and contents, abolished petitions for allowance of appeal, citations and assignments of error, and directed the clerk of the district court to notify the adverse

party of the appeal and to forward the duplicate notice to the appellate court with a statement of docket entries. 327 U. S. 857. The rule, which was never submitted to Congress, is in substance present Rule 37(a); two subsequent amendments—both put into effect without submission to Congress—have not changed it in any respect material here.[3] On March 21, 1946 Rules 1 to 31 and 40 to 60 of the Federal Rules of Criminal Procedure also became effective. These had been prescribed to govern "proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty . . . pursuant to Act of June 29, 1940, ch. 445, 54 Stat. 688." (Letter of transmittal from Chief Justice Stone to Attorney General Biddle, December 26, 1944, 327 U. S. 823; see *id.* at 821.) They became effective following submission to Congress as required of pre-verdict rules by the 1940 act; subsequent amendments to them have similarly been submitted.[4]

Thus the procedural history and explicit language of the order promulgating Rule 37 make clear that it applies—because it can only apply—to appeals "after verdict, finding of guilty or not guilty by the court, or plea of guilty." 327 U. S. 825. To apply it to pre-verdict appeals would attribute to this Court disregard of the specific command of Congress that pre-verdict rules be submitted to its scrutiny before they take effect. Georgia's suggestion (Br.

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[3] By order dated December 27, 1948, effective January 1, 1949, the Court substituted the language "court of appeals" for "circuit court of appeals," conforming the rule to the phraseology of the Judicial Code revision of 1948. 335 U. S. 917-918. By order of April 12, 1954, effective July 1, 1954, contemporaneous with its adoption of Revised Rules of the Supreme Court, the Court rewrote Criminal Rule 37 to provide that appeals and petitions for certiorari to the Court were governed by its revised rules. 346 U. S. 941-942.

[4] E.g., 335 U. S. 949; 350 U. S. 1019.

16-17) that the codifiers' cross-reference to Rule 37 in the 1948 Criminal Code, Act of June 25, 1948, ch. 645, 62 Stat. 845, satisfies the submission requirement is extravagant. Apart from the consideration that this Court has since amended the Rule without resubmission, 346 U. S. 941-942; see note 3 *supra*, the cross-reference is palpably devoid of substantive effect and—even were it given such effect—could mean nothing more than acceptance of the rule in the form in which the Court promulgated it: as a post-verdict rule. Georgia also has the argument (Br. 17-19) that the 30-day limitation for government appeals in Rule 37(a)(2) compels construction of that rule as applicable to pre-verdict appeals. This would be the case only if all government appeals allowed by statute were pre-verdict appeals, but of course they are not. See 18 U. S. C. §3731 para. 7 (1964). Rule 37(a)(2) *is*, as Georgia suggests, "a nullity as to 'before verdict' appeals" by the government (Br. 18), where such appeals are authorized by statute. See 18 U. S. C. §§1404, 3731 para. 6 (1964). Its sole purpose is to assure that the 30-day limitations prescribed by each of these statutes, see the last sentence of §1104 and paragraph 8 of §3731, are not deprived of force by any implication derived from Rule 37. See 18 U. S. C. §3772, para. 3 (1964). Georgia's contention (Br. 19) that the limitation by Rule 37(a)(2) of a period of ten days "after entry of the judgment or order appealed from"—as contrasted with the limitation by former Rule III of a period "after entry of judgment of conviction," 292 U. S. 662,—comports a purpose of Rule 37(a)(2) to reach some pre-verdict "order," exhibits the same vice of reasoning. The contention would be tenable if no appealable "order" could be made in a criminal case after verdict; but see Rules 32(d), 33, 34, 35. The specification of "order" in Rule 37(a)(2) is un-

doubtedly designed principally to reach orders denying motions for correction of sentence under Rule 35, see *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959), in light of the revelations of *United States ex rel. Coy* v. *United States*, 316 U. S. 342 (1942), and *Meyers* v. *United States*, 116 F. 2d 601 (5th Cir. 1940).

Indeed, Georgia's arguments in this aspect would hardly merit debate[5] but for the awkward circumstance that they point up a *casus omissus* in the Criminal Rules.[6] If Rule 37(a)(2) is properly read as applicable only to post-verdict appeals, there is no time limited by the Rules for pre-verdict appeals.[7] The omission is of scant practical signifi-

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[5] The order promulgating Rule 37 and its companion rules, containing an explicit restriction of their operation to post-verdict proceedings, 327 U. S. 825, came five years after *Nye* v. *United States*, 313 U. S. 33 (1941), had clearly established that such explicit restrictions "describe the kinds of cases to which [the rules] . . . are to be applied." *Id.* at 44.

[6] Obviously, foresight of every case which may arise in administration of a system of criminal rules is impossible, and it has previously occurred that *lacunae* have been discovered in the Federal Rules. See *United States ex rel. Coy* v. *United States*, 316 U. S. 342 (1942); *Lott* v. *United States*, 367 U. S. 421 (1961); *United States* v. *Healy*, 376 U. S. 75 (1964). One cardinal virtue of judicial rule-making is that such problems may be effectively corrected by the judiciary, whose concern they principally are, and that correction may be made without unfair surprise to individual litigants.

[7] Defendants agree with Georgia (Br. 27) that neither FED. RULE CIV. PRO. 73(a) nor 28 U. S. C. §2107 (1964) can be applied to limit the time for pre-verdict appeals in criminal cases. The reach of Rule 73 is restricted to civil actions by FED. RULE CIV. PRO. 1; and the similar restriction of §2107, in contrast to its predecessor, 28 U. S. C. §230 (1940), is not inadvertent. See H. REP. No. 308, 80th Cong., 1st Sess. A174 (1947). The exclusion of criminal appeals from the latter section by reason of the revisers' view that Criminal Rule 37 governed such appeals, cannot of course be taken to imply that the revisers or Congress thought Rule 37 applicable to pre-verdict criminal appeals. They, like this Court in promul-

cance, because the strong tradition against interlocutory criminal appeals in federal practice disallows pre-verdict appeal altogether except where expressly authorized by statute, see *DiBella* v. *United States*, 369 U. S. 121 (1962); *Cobbledick* v. *United States*, 309 U. S. 323 (1940); *Parr* v. *United States*, 351 U. S. 513 (1956), and each of the few extant statutory authorizations has a built-in limitations period. See 18 U. S. C. §§1404, 3731 (1964).[8] The sole exception is the statute under which the present case arises: 28 U. S. C. §1447(d) (1964), as amended by §901 of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 266, to provide that "an order remanding a case to the State court from which it was removed pursuant to section 1443 of [title 28] . . . shall be reviewable by appeal or otherwise."[9]

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gating the Criminal Rules, had no occasion to direct their attention to pre-verdict appeals—a rare form of proceeding whose timeliness was otherwise regulated by statute. When Congress did subsequently address the question—authorizing interlocutory appeals from suppression orders in narcotics cases by the Act of July 18, 1956, ch. 629, §201, 70 Stat. 573, 18 U. S. C. §1404 (1964)—it did not assume the applicability of Criminal Rule 37, but included a thirty-day limitation in the act.

[8] It is true, of course, that if Rule 37(a)(2) does not govern pre-verdict proceedings, neither do any of the provisions of Rules 32-39. This is not a matter of moment, however. Rules 32-36, the second sentence of Rule 37(a)(2), and Rule 38(a) are, by the nature of their provisions, inapplicable at pre-verdict stages. Rules 37(b), (c) and 38(b) are merely cross-references to other rules applicable of their own force. Rules 37(a)(1), 38(c) and 39 are chiefly housekeeping regulations; authority to proceed in the few rare pre-verdict appeals with respect to the matters covered by these rules is amply conveyed by Rule 57(b).

[9] The present case was removed, remanded, and an appeal from the remand order taken prior to the enactment of §901. The court below held that the statute nevertheless governed the case (R. 20-21), under the ordinary principle that procedural legislation—including legislation affecting the jurisdiction of particular courts e.g., *Bruner* v. *United States*, 343 U. S. 112 (1952)—is applied to

Even in §1443 (civil rights removal) cases, absence of a provision limiting the time for appeal of remand orders is of little importance because, as indicated in the next section of this brief, the traditional mode of review of remand orders by prerogative writ which was revived by the "otherwise" clause of the 1964 act is available beyond any time which might be limited for review by appeal. Whether review is sought by appeal or prerogative writ, the reviewing court does not lack power to refuse its process in cases of abusive delay by the party seeking review.[10] But if, in any event, some specific limitation of time for pre-verdict appeal should be thought desirable, "that problem and its kindred ones, brought to the fore in this case, [should be left] for resolution by the rule-making process," *Lott* v. *United States*, 367 U. S. 421, 425 (1961), rather than solved in jury-rig fashion by a judicial decision expanding present Rule 37(a)(2) beyond the plain scope of the order promulgating it and in violation of a plain legislative restriction

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litigation pending at the time of its passage. E.g., *Ex parte Collett*, 337 U. S. 55 (1949); *Orr* v. *United States*, 174 F. 2d 577 (2d Cir. 1949); *Schoen* v. *Mountain Producers Corp.*, 170 F. 2d 707 (3d Cir. 1948); *Bowles* v. *Strickland*, 151 F. 2d 419 (5th Cir. 1945); and see *Hoadley* v. *San Francisco*, 94 U. S. 4 (1876). Georgia has not challenged that ruling (see Petition for Certiorari 3-6; Pr. 4-7), and defendants see no need to labor the point or their alternative contention, urged when this case was last here prior to the Civil Rights Act of 1964, that former 28 U. S. C. §1447(d) (1958) did not prohibit review of the remand order by the court of appeals. See Brief for Respondents Rachel et al., in *Georgia* v. *Tuttle*, 377 U. S. 987 (1964), pp. 9-28, 32-44.

[10] As indicated at p. 32 *infra*, principles of laches would govern the timeliness of a petition for mandamus to review a remand order. Defendants see no reason why the same principles might not be applied, under 28 U. S. C. §2106 (1964), to refuse relief on appeal from a remand order in a case in which a criminal defendant inexcusably delayed taking his appeal until after the commencement of (or, perhaps, until the eve of) his post-remand state-court trial. No such case is presented by this record.

on the pre-verdict rule-making power. T' is solution proposed by Georgia is at best a partial one, half-sighted and unfair. Application of Rule 37(a)(2) to pre-verdict appeals in civil rights removal cases would impose a ten-day limit only on appeals "by a defendant." If a federal district court accepted removal jurisdiction and dismissed a prosecution—as was done, for example, in the Selma, Alabama cases, on authority of the decision below in the present case[11]—any state appeal from such an order within the jurisdiction given by 28 U. S. C. §1291 (1964) would remain unlimited as to time.[12] If the Civil Rights Act of 1964 has occasioned new sorts of interlocutory appeals, this Court by rules duly submitted to Congress can and should regulate them by prescriptions specifically and comprehensively addressed to their particular nature. Defendants submit that under the present rules there is no authority for holding their appeal untimely.[13]

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[11] *Alabama* v. *Boynton*, S. D. Ala. C. A. No. 3560-65, decided April 16, 1965.

[12] The thirty-day limitation upon appeals "by the government" in Rule 37(a)(2) could hardly be thought applicable to appeal by a State in a removed criminal case. As the advisory committee note on the rule indicates, that limitation was intended simply to reflect the thirty-day rule of the Criminal Appeals Act, 18 U. S. C. §3731 (1964).

[13] *United States* v. *Williams*, 227 F. 2d 149 (4th Cir. 1955), cited at Br. 18-19, is not persuasive. It is true that the Fourth Circuit, there dismissing a government appeal noted more than thirty days after dismissal of an indictment, assumed that Rule 37 governed the case. But the assumption is not supported by reasoning, and the dismissal was in any event compelled by the thirty-day limitation of 18 U. S. C. §3731 (1964). Cf. *United States* v. *Roth*, 208 F. 2d 467 (2d Cir. 1953). *Semel* v. *United States*, 158 F. 2d 229, 231 (5th Cir. 1946) (alternative ground), does apply Rules 37 and 39 to a pre-verdict appeal, but, again, without considered discussion.

**B. The Court of Appeals Had Jurisdiction to Review the Remand Order by Proceedings in the Nature of Mandamus, as to Which No Time Is Limited by Rule.**

But even should this Court accept Georgia's contention that the court of appeals lacked power to entertain defendants' appeal by reason of untimely filing, it could not properly reverse the decision below. The court of appeals plainly had jurisdiction to review the district court's remand order by proceedings in the nature of mandamus instituted more than ten days after the order. (See subsection (1) *infra.*) Defendants in their brief below invoked the discretion of that court to hear their case, in the event appeal proved abortive, by the prerogative writ. The court failed to consider such an exercise of discretion only because it sustained the appeal. If its holding on this latter point is now upset, the case must be remanded to the court of appeals for its determination, in light of its prior practice in such matters (see subsection (2) *infra*), whether it will ignore technical imperfections in the presentation of the proceeding and will entertain the attempted appeal as on petition for mandamus.

1. ***The Remand Order Is Reviewable by Mandamus.***

The court below rested its competence to review the remand order on 28 U. S. C. §1447(d), as amended by the Civil Rights Act of 1964, §901, 78 Stat. 266. Georgia has not challenged that ruling in this Court and it appears clearly correct.[14] Prior to the 1964 act, §1447(d) provided that "An order remanding a case to the State court from which it was removed is not reviewable on appeal or other-

[14] See note 9 *supra.*

wise."[15] The 1964 act added the language: "except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." By this somewhat blunderbuss language, Congress obviously intended principally to make the exception for §1443 cases coextensive with the general bar which §1447(d) imposes in all other removal cases:[16] the effect of the provision is to authorize review by any fit legal mode. "Appeal" is specified:[17] ac-

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[15] There is very substantial reason to believe that this section had no application to removed criminal cases, or to any cases removed under 28 U. S. C. §1443. See Brief for Respondents Rachel et al., in *Georgia* v. *Tuttle*, 377 U. S. 987 (1964), pp. 9-28, 32-44. Nevertheless, even those who held this belief recognized the desirability of explicit congressional exception of §1443 cases from the review bar. See Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1189-1190 (1963). Congress provided this explicit exception by the 1964 act.

[16] Dissatisfied with the restrictive reading which the district courts were giving §1443 on authority of "some old Supreme Court decisions which appear to hold that removal is proper only if the case involves a provision of a State constitution or a statute which on its face denies equal civil rights," 110 CONG. REC. 6955 (April 6, 1964) (remarks of Senator Dodd), and convinced that such a reading rendered the civil rights removal statute "practically useless," *ibid.*, Congress sought to give this Court "an opportunity to reexamine, in the light of existing conditions, the scope of the right to remove in certain civil rights cases," *id.* at 6551 (March 30, 1964) (remarks of Senator Humphrey); see also *id.* at 6564 (March 30, 1964) (remarks of Senator Kuchel). No attention was paid in the debates to the mode of review.

[17] It is hardly debatable that, following the 1964 act, remand orders are reviewable by appeal. Such orders were held non-final, hence not reviewable by writ of error in *Railroad Co.* v. *Wiswall*, 23 Wall. 507 (1874), note 19 *infra*. However, this Court's recent decisions in *Local No. 438* v. *Curry*, 371 U. S. 542 (1963), and *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963), point to broader modern concepts of finality, and the latter case particularly suggests that an order is "final" which sends a litigant for trial into a forum where Congress has given him a specific right

cepted doctrine and history make clear that mandamus is equally available under the "otherwise" clause.

Under the all writs section of the Judicial Code, 28 U. S. C. §1651 (1964), the courts of appeals have power to issue orders in the nature of mandamus[18] in aid of their appellate jurisdiction. Since, pursuant to 28 U. S. C. §1291 (1964), the Court of Appeals for the Fifth Circuit could review final decisions of the District Court for the Northern District of Georgia in these removed criminal actions, Fifth Circuit review "agreeable to the usages and principles of law" (§1651) of interlocutory orders in the cases is allowable, *United States* v. *Smith,* 331 U. S. 469 (1947); *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957); *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U. S. 240 (1964) (by implication), particularly where the interlocutory order prevents the cases from coming to final judgment in the district court and thus defeats the normal appellate jurisdiction of the court of appeals under §1291. *McClellan* v. *Carland,* 217 U. S. 268 (1910).

"Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases

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not to be tried. See also *United States* v. *Wood,* 295 F. 2d 772 (5th Cir. 1961). In view of the extended notion of finality expressed in these decisions, and the explicit statutory specification of "appeal" as a mode of review in the 1964 act, appeal from remand orders in §1443 cases ought now be allowed under the general jurisdictional grant of 28 U. S. C. §1291 (1964).

[18] FED. RULE CIV. PRO. 81(b), formally abolishing the writ of mandamus and providing that all relief previously available by mandamus may be obtained by appropriate action or motion, does not affect the scope of relief in the nature of mandamus which a federal appellate court may give. *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957) (by implication). Indeed, in view of FED. RULE CIV. PRO. 1, the application of Rule 81 to original proceedings in the courts of appeals is questionable.

where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy. . . . " *Ex parte Newman*, 14 Wall. 152, 165 (1871) (dictum). See *Insurance Co.* v. *Comstock*, 16 Wall. 258 (1872) (issuing advisory opinion to do service for mandamus). Relying on *Newman* and *Comstock*, this Court in *Railroad Co.* v. *Wiswall*, 23 Wall. 507 (1874), decided that an order of a federal trial court remanding a removed case to the state court was reviewable by mandamus.[19] That ruling has never been questioned in subsequent cases. See *Hoadley* v. *San Francisco*, 94 U. S. 4, 5 (1876); *Babbitt* v. *Clark*, 103 U. S. 606, 610 (1880); *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 555 (1882); *Gay* v. *Ruff*, 292 U. S. 25, 28 n. 3 (1934); *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 378 (1937); also *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, 580 (1896); *United States* v. *Rice*, 327 U. S. 742, 749-750 (1946). It is accordingly clear that, but for any question arising from former 28 U. S. C. §1447(d), "the power of the court to issue the mandamus would be undoubted." *In re Pennsylvania Co.*, 137 U. S. 451, 453 (1890). Exception of civil rights removal cases from the review bar of the section therefore makes the writ available.

The availability of an appeal from the remand order does not affect that of the writ. The two remedies are alternatively available under the 1964 amendment. Mandamus is not here invoked to perform a function customarily performed by appeal. Compare *Ex parte Fahey*, 332 U. S. 258

[19] The *Wiswall* case was decided before the creation of the courts of appeals in 1891, at a time when this Court had the same immediate appellate superintendence over the old circuit courts that the courts of appeals now have over the district courts. In *Wiswall* the Court dismissed a writ of error to the circuit court on the ground that the proper remedy was an application to the Court for mandamus.

(1947). Rather, of the remedies, mandamus is the more settled, the more traditional in this use. For that reason, the principle that mandamus "is not to be used as a substitute for appeal," *Schlagenhauf* v. *Holder*, 379 U. S. 104, 110 (1964), has no application. The principle is an aphoristic expression for the related considerations that this Court will not ordinarily permit use of the writ to obtain interlocutory review unauthorized by Congress, see e.g., *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943); *Bankers Life and Cas. Co.* v. *Holland*, 346 U. S. 379 (1953), and that the pervasive federal policy against such interlocutory review will only yield in cases of plain abuse of discretion or legal error by a district court, see *Schlagenhauf* v. *Holder*, *supra*; *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240 (1964). Neither of these considerations is involved in the present use of the prerogative writ—the first, because Congress has explicitly authorized interlocutory review of remand orders; the second, for that reason and because, in any event, the present case presents a question of first impression concerning federal jurisdiction turning on construction of an important federal statute, see *Schlagenhauf* v. *Holder*, *supra*; *Van Dusen* v. *Barrack*, 376 U. S. 612, 615 n. 3 (1964). The aphorism has never been thought to mean that in an otherwise fitting case mandamus would not lie for the sole reason that the question sought to be raised by the writ was raisable on an appeal, see *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196 (1945); and an unbroken line of authority supports the fitness of mandamus for the specialized purpose of requiring a lower court to assume a jurisdiction which it has wrongly declined. See pp. 29-30 *supra*.

Nor, since both appeal and mandamus are available modes of review, were these defendants obligated to seek

the latter within the time limited for the former. See *Coppedge* v. *United States*, 369 U. S. 438, 445 n. 10 (1962), where this Court held that a federal criminal defendant's application to a court of appeals for leave to proceed on appeal *in forma pauperis* was timely as an original application to that court notwithstanding the defendant did not within ten days file an available appeal from the district court's denial of such leave. The question of timeliness in application for the writ is governed by principles of laches, see *In re Hohorst*, 150 U. S. 653 (1893); and neither in its motion to dismiss the appeal below (see R. 10-13) nor in its original petition for prerogative writs previously filed in this Court (see Petition in *Georgia* v. *Tuttle*, 377 U. S. 987 (1964)) has Georgia ever asserted facts which would support a finding of laches on the part of these defendants.

**2. *The Court of Appeals Might Permissibly Entertain the Present Proceeding as on Petition for Mandamus.***

Defendants have never filed in the court of appeals any paper specifically denominated a petition for mandamus, although in their brief below they urged that the court treat their motion of March 12, 1964 (App. 1a-3a) seeking stay of the district court's remand order, as such a petition. Clearly it would lie within the power of the court of appeals so to treat the motion; liberal treatment would comport with prior practice both of this Court and of the Fifth Circuit. E.g., *Georgia Hardwood Lumber Co.* v. *Compania de Navegacion Transmar, S.A.*, 323 U. S. 334 (1945) (notice of appeal treated as application for allowance of appeal in admiralty in order to save appeal); *Crump* v. *Hill*, 104 F. 2d 36 (5th Cir. 1939) (filing in Court of Appeals of acknowledgment of service of notice of appeal and

designation of record treated as filing of notice of appeal in order to save appeal); *Des Isles* v. *Evans*, 225 F. 2d 235 (5th Cir. 1955) (application for leave to appeal *in forma pauperis* treated as notice of appeal in order to save appeal); *Roth* v. *Bird*, 239 F. 2d 257 (5th Cir. 1956) (same); *O'Neal* v. *United States*, 272 F. 2d 412 (5th Cir. 1959) (appeal bond treated as notice of appeal in order to save appeal); *Carter* v. *Campbell*, 285 F. 2d 68 (5th Cir. 1960) (securing of District Court order transmitting exhibits to Court of Appeals, and filing in Court of Appeals a motion for leave to prosecute appeal on typed record treated as filing notice of appeal in order to save appeal); and for an extreme instance see *Hadjipateras* v. *Pacifica, S.A.*, 290 F. 2d 697 (5th Cir. 1961) (motion in District Court for allowance of appeal in admiralty and motion in Court of Appeals for expedited hearing treated as petitions to the respective courts for allowance of interlocutory appeal) (alternative ground).[20] Treatment of the March 12 motion or of the other appeal papers (see *New York* v. *Galamison*,

[20] The clear weight of federal authority supports the Fifth Circuit decisions cited. E.g., *In re Leigh*, 139 F. 2d 386 (D. C. Cir. 1943) (petition to Court of Appeals for special appeal treated as notice of appeal in order to save appeal); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *McGrath*, 180 F. 2d 406 (D. C. Cir. 1950) (same); *The Astorian*, 57 F. 2d 85 (9th Cir. 1932) (petition for libel of review treated as petition for rehearing in order to extend appeal time and save appeal); *Dickey* v. *United States*, 332 F. 2d 773 (9th Cir. 1964) (notice of motion for new trial treated as motion for new trial in order to extend appeal time and save appeal). By contrast, the Seventh Circuit tends to insist on technical perfection. *Hulson* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 289 F. 2d 726 (7th Cir. 1961). But the court below had previously adopted "the more liberal rule" in such matters, *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955) (notice of appeal from denial of post-trial motions treated as addressed to underlying judgment as well), as has this Court since, *Foman* v. *Davis*, 371 U. S. 178 (1962) (same).

342 F. 2d 255, 257 (2d Cir. 1965) (dictum)) as petitions for mandamus would be the more justifiable here because, should review be denied on technical grounds, defendants can readily file a second removal petition and return this case to its present posture with all technical defects cured. Cf. *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959).[21] At the least, then, if this Court concludes that defendants' attempted appeal was untimely, the Court should remand the case to the Fifth Circuit so that that court may exercise its discretion to review the remand order as on petition for a prerogative writ.

**C. This Court May Review the Remand Order as on Original Petition for Mandamus.**

Finally, it should be noted that this Court need not resolve any issue of the jurisdiction of the court of appeals in order to reach the important substantive question here presented. Under 28 U. S. C. §1651 (1964), the Court at its discretion might treat the case as properly before it within its original jurisdiction to issue a writ of mandamus to the district court without limitation of time. See *Ex parte Peru*, 318 U. S. 578 (1943). In view of the volume

[21] Defendants' counsel would be worse than disingenuous not to concede that their papers were badly styled and that they are now in the graceless posture, as Georgia puts it, of "trying frantically to . . . 'stay in court'" (Br. 29). In February and March, 1964 the manner of obtaining review of a district court remand order was far from clear and, while this does not excuse counsel's technical failures, it does suggest the harshness of visiting irreparable consequences on defendants. Cf. *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group*, 311 U. S. 579 (1941) (notice of appeal treated as petition to Court of Appeals for leave to appeal where method of appeal was unsettled); *Cutting* v. *Bullerdick*, 178 F. 2d 774 (9th Cir. 1949) (notice of motion for a stay of execution pending posting of a supersedeas bond treated as notice of appeal where manner of a notice of appeal was unsettled).

of litigation pending in the lower federal courts, see Petition for Certiorari, *Anderson* v. *City of Chester*, O. T. 1965, No. 443, and the obvious "public importance" of expeditious construction of the civil rights removal statute, see *Ex parte United States*, 287 U. S. 241 (1932), the exercise of that discretion in this case—already briefed and ripe for argument—would seem appropriate.

## II.

**Defendants Criminally Prosecuted for Conduct Protected by Title II of the Civil Rights Act of 1964 May Remove Their Prosecutions Under 28 U. S. C. §1443 Without Showing That the State Criminal Statutes Underlying Their Prosecutions Are Facially Unconstitutional or the State Courts Unfair.**

Part II of Georgia's brief (Br. 30-50) appears to make two different points. The first involves construction of 28 U. S. C. §1443 (1964): Georgia contends that removal under subsection (1) of that section is not available unless the party seeking to remove is charged under, or otherwise affected by, state legislation unconstitutional on its face (Br. 30, 31-34, 42-43, 46); and that removal under subsection (2) of the section is limited to federal officers and persons acting under their authority (Br. 35-41, 43-46). The second point is one of pleading: Georgia contends that the removal petition was insufficient for lack of detailed factual allegations (Br. 30-31, 34-35), hence did not require hearing (Br. 47-50). Part III of Georgia's brief (Br. 50-54) also makes two points. The first concerns statutory construction: subsection 1443(1) is said not to authorize removal except upon a showing that the state courts will not fairly entertain a petitioner's federal claim (Br. 51-54). The

second questions the court of appeals' construction of *Hamm v. City of Rock Hill*, 379 U. S. 306 (1964), and consequently the propriety of its directions to the district court on remand (Br. 50-51). Defendants will deal with the two points of statutory construction in this Part II of their brief, will deal in Part III *infra* with the sufficiency of their removal petition as a pleading, and will deal in Part IV *infra* with the scope of the court of appeals' remand directions.

Adequate consideration of the questions of construction posed by this case requires a somewhat extended discussion of the legislative and judicial backgrounds of the civil rights removal statute, 28 U. S. C. §1443 (1964). The road of inquiry is long but leads straight to the conclusion that state criminal defendants charged with offenses based on conduct protected by the public accommodations sections of the Civil Rights Act of 1964 may remove their prosecutions to a federal district court on that ground alone, without showing that the state statute under which they are charged is facially unconstitutional, or that the state courts will not fairly hear their federal defense.

## A. The Background of 28 U. S. C. §1443

### 1. *Legislative Background*

Increasingly since the inception of the Government, federal removal jurisdiction has been expanded by Congress[22]

[22] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1147-1150 (1953). Before 1887, the requisites for removal jurisdiction were stated independently of those for original federal jurisdiction; since 1887, the statutory scheme has been to authorize removal generally of cases over which the lower federal courts have original jurisdiction and, additionally, to allow removal in special classes of cases particularly affecting the national interest: suits or prosecutions against federal officers, military personnel, persons unable to enforce their equal civil rights in the state courts,

to protect national interests in cases "in which the State tribunals cannot be supposed to be impartial and unbiassed [sic]," [23] for history has increasingly taught the wisdom of Hamilton's insight: "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . . " [24] In the Constitutional Convention Madison pointed out the need for such protection just before he successfully moved the Committee of the Whole to authorize the national legislature to create inferior federal courts.[25]

> Mr. [Madison] observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court.

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persons acting under color of authority derived from federal law providing for equal rights or refusing to act inconsistently with such law, the United States (in foreclosure actions), etc. 28 U. S. C. §§1441-1444 (1964); see HART & WECHSLER, *supra*, at 1019-1020.

[23] THE FEDERALIST, No. 80 (Hamilton) (Warner, Philadelphia ed. 1818), at 429.

[24] *Id.*, No. 81, at 439.

[25] 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (1911). Mr. Wilson and Mr. Madison moved the matter pursuant to a suggestion of Mr. Dickinson.

> An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.[26]

The early Congresses made very sparing use of the power which was thus given them by the Constitution; during nearly three quarters of a century following the Judiciary Act of 1789,[27] they acted largely on the principle "that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme Court." [28] The federal trial courts were employed only for the limited federal specialties; no general federal question jurisdiction was created.[29] Original civil diversity jurisdiction was given[30] —responding then, as today, to "the possible shortcomings of State justice," particularly the localization of trial in parochial communities where "justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang'" [31]—and

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[26] *Id.* at 124.

[27] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[28] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727 (1953).

[29] Except by the federalist Act of Feb. 13, 1801, ch. 4, §11, 2 Stat. 89, 92, quickly repealed by the Act of March 8, 1802, ch. 8, 2 Stat. 132.

[30] Act of Sept. 24, 1789, ch. 20, §11, 1 Stat. 78.

[31] ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Commentary, General Diversity Jurisdiction, at 41 (Tent. Draft No. 1, 1963).

civil removal jurisdiction was given in three sorts of cases[32] where it was particularly feared that local prejudice might impair national concerns. In criminal cases, however, the federal trial courts were entirely excluded from incursion into state proceedings,[33] section 14 of the Judiciary Act expressly excepted state prisoners from the federal habeas corpus authority.[34]

Experience soon showed, however, the potential of the state criminal process for destruction of vital national concerns. Congress responded with limited grants of federal trial court jurisdiction, in removal and habeas corpus. In 1815, confronted by New England's resistance to the War of 1812,[35] Congress in a customs act allowed removal of suits or criminal prosecutions

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[32] The Act of Sept. 24, 1789, ch. 20, §12, 1 Stat. 79, authorized removal in the following classes of cases where more than $500 was in dispute: suits by a citizen of the forum state against an outstater; suits between citizens of the same state in which the title to land was disputed and the removing party set up an outstate land grant against his opponent's land grant from the forum state; suits against an alien. The first two classes were specifically described by Hamilton as situations "in which the state tribunals cannot be supposed to be impartial," *The Federalist* No. 80, at 432 (Warner ed. 181). Madison speaking of state courts in the Virginia convention, amply covered the third: "We well know, sir, that foreigners cannot get justice done them in these courts. . . ." 3 *Elliot's Debates* 583 (1836).

[33] The jealousy of the States as regards their criminal process is indicated by the furor aroused by Supreme Court assumption of jurisdiction to review federal questions in state criminal cases as late as 1821. *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264 (1821); see 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 547-59 (rev. ed. 1932).

[34] Except where it was necessary to bring them into court to testify. Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 81.

[35] See 1 Morison & Commager, *Growth of the American Republic* 426-29 (4th ed. 1950).

> against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof.[36]

In 1833, confronted by South Carolina's opposition to the tariff,[37] Congress enacted the famed Force Act, giving the President extensive power to use the military forces of the United States to protect federal customs officers and suppress resistance to the customs laws;[38] extending the civil jurisdiction of the federal courts to all cases arising under the revenue laws;[39] authorizing removal of any suit or prosecution

> against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States;[40]

and adding to the federal habeas corpus jurisdiction

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[36] Act of Feb. 4, 1815, ch. 31, §8, 3 Stat. 198; Act of March 3, 1815, ch. 93, §6, 3 Stat. 233. Both enactments were temporary legislation. Their removal provisions were extended four years by Act of March 3, 1817, ch. 109, §2, 3 Stat. 396.

[37] See 1 Morison & Commager, *op. cit., supra,* note 35, 475-85.

[38] Act of March 2, 1833, ch. 57, §§1, 5, 4 Stat. 632, 634.

[39] Act of March 2, 1833, ch. 57, §2, 4 Stat. 632.

[40] Act of March 2, 1833, ch. 57, §3, 4 Stat. 633. Section 2 of the act envisioned that under certain circumstances private individuals, as well as federal officers, might take or hold property pursuant to the revenue laws.

> power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.[41]

The act's evident purpose was to exclude state court jurisdiction in cases affecting the tariff,[42] and to give the federal

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[41] Act of March 2, 1833, ch. 57, §7, 4 Stat. 634.

[42] This purpose is apparent as respects the removal jurisdiction, which was sustained in *Tennessee* v. *Davis*, 100 U. S. 257 (1880), against constitutional complaints that "it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offenses against the criminal laws of a State." *Id.* at 266. The revenue officer removal provisions were continued in successive judiciary acts until 1948, when they were extended to encompass all federal officers and persons acting under them. 28 U. S. C. §1442(a)(1) (1964). As for the habeas corpus grant, continued in substance in present 28 U. S. C. §2241(c)(2) (1964), this has always been construed as directing the federal courts to entertain petitions for the writ in advance of state trial in cases where federal officers are prosecuted, see the authorities collected in the briefs and opinion in *In re Neagle*, 135 U. S. 1 (1890); e.g., *Reed* v. *Madden*, 87 F. 2d 846 (8th Cir. 1937); *In re Fair*, 100 Fed. 149 (C. C. D. Neb. 1900); *United States ex rel. Flynn* v. *Fuelhart*, 106 Fed. 911 (C. C. W. D. Pa. 1901); *United States* v. *Lipsett*, 156 Fed. 65 (W. D. Mich. 1907); *Ex parte Warner*, 21 F. 2d 542 (N. D. Okla. 1927); *Brown* v. *Cain*, 56 F. Supp. 56 (E. D. Pa. 1944); *Lima* v. *Lawler*, 63 F. Supp. 446 (E. D. Va. 1945), or where private citizens acting under federal officers are prosecuted, *Anderson* v. *Elliott*, 101 Fed. 609 (4th Cir. 1900), dism'd 22 S. Ct. 930 (1902); *West Virginia* v. *Laing*, 133 Fed. 887 (4th Cir. 1904). Discharge of federal officers has sometimes been denied after evidentiary hearing where the evidence did not preponderantly show that the officer was acting within the scope of his federal authority. *United States ex rel. Drury* v. *Lewis*, 200 U. S. (1906); *Birsch* v. *Tumbleson*, 31 F. 2d 811 (4th Cir. 1929); *Castle* v. *Lewis*, 254 Fed. 917 (8th Cir. 1918); *Ex parte Tilden*, 218 Fed. 920 (D. Ida.

courts plenary power to enforce the tariff against concerted state resistance, including state judicial resistance: it was "apparent that the constitution of the courts in South Carolina makes it necessary to give the revenue officers the right to sue in the federal courts." [43]

The federal habeas corpus jurisdiction was extended again in 1842 to authorize release of foreign nationals and domiciliaries held under state law or process on account of any act claimed to have been done under color of foreign authority depending on the law of nations.[44] This extension was occasioned by the *McLeod* case,[45] in which the New York courts nearly provoked an international incident by refusing to relinquish jurisdiction over a British subject held for murder who claimed that the acts with which he was charged were done under British authority. McLeod was acquitted at his trial, but the need for an expeditious federal remedy to short-cut the state court process in such cases was strongly felt: "If satisfied of the existence in fact and validity in law of the [plea in] bar, the federal jurisdiction will have the power of administering prompt

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1914). The evidentiary standard is discussed in *Brown* v. *Cain* and *Lima* v. *Lawler, supra.* These cases do not reflect hesitation to use the federal writ to abort state trial in any case in which the interests of the federal government are affected; they indicate only that, in each case, the federal interest was not sufficiently shown on the facts. See *In re Matthews,* 122 Fed. 248 (E. D. Ky. 1902), and particularly *In re Miller,* 42 Fed. 307 (E. D. S. C. 1890); cf. *Ex parte United States ex rel. Anderson,* 67 F. Supp. 374 (S. D. Fla. 1946), decided on same grounds without a hearing.

[43] 9 *Cong. Deb.* 260 (Jan. 29, 1833). The speaker is Senator Wilkins, who reported the bill, *id.* at 150 (Jan. 21, 1833), and managed it in the Senate, *id.* at 246 (Jan. 28, 1833). See also, *id.* at 329-32 (Feb. 2, 1833) (remarks of Senator Frelinghuysen).

[44] Act of August 29, 1842, ch. 257, 5 Stat. 539.

[45] See *People* v. *McLeod,* 25 Wend. 482 (Sup. Ct. N. Y. 1841).

relief." [46] Again, as in 1815 and 1833, the scope of federal intrusion was narrow.

But the Civil War and its aftermath changed the congressional temper sharply. During and after the War, Congress multiplied the uses of the federal courts and, in particular, their uses to anticipate the state criminal process. By the Habeas Corpus Suspension Act of 1863[47] it immunized from state civil and criminal liability persons making searches, seizures, arrests and imprisonments under presidential orders during the existence of the rebellion; to insure this protection, it provided in section 5 of the act for removal of all suits and criminal prosecutions

> against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress.[48]

The debates preceding passage of the act reflected congressional concern that federal officers could not receive a fair trial in hostile state courts, and that the appellate supervision of the Supreme Court of the United States would

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[46] Senator Berrien, at CONG. GLOBE, 27th Cong., 2d Sess. 444 (4/26/42). Mr. Berrien, chairman of the Senate Judiciary Committee, reported and managed the bill which became the act. *Id.* at 443. See the discussion of the act in *In re Neagle*, 135 U. S. 1, 71-72, 74 (1890).

[47] Act of March 3, 1863, ch. 81, 12 Stat. 755.

[48] 12 Stat. 756.

be inadequate to rectify the decisions of lower state tribunals having the power to find the facts.[49]

In 1864 and 1866,[50] Congress also extended the customs-officer removal provisions of the 1833 Force Act to cover civil and criminal cases involving internal revenue collection. In their final 1866 form, these provisions authorized federal removal of suits and prosecutions "against any officer of the United States appointed under or acting by authority of [the revenue laws] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office," or against persons claiming title from such officers, where the cause concerned the property and affected the validity of the revenue laws.

During the first months of the Thirty-Ninth Congress, Union military commanders in the defeated South transferred from the state courts to national military tribunals civil and criminal jurisdiction over cases involving Union

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[49] CONG. GLOBE, 37th Cong., 3d Sess. 534-38 (Jan. 27, 1863).

[50] Act of March 7, 1864, ch. 20, §9, 13 Stat. 17; Act of June 30, 1864, ch. 173, §50, 13 Stat. 241; Act of July 13, 1866, ch. 184, 14 Stat. 98. By the 1866 act Congress (a) generally amended the revenue provisions of the act of June 30, 1864; (b) in §67, 14 Stat. 171, authorized removal of any civil or criminal action

> against any officer of the United States appointed under or acting by authority of [the Act of June 30, 1864, and amendments thereto] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws] . . . ;

and (c) in §68, 14 Stat. 172, repealed the removal provisions (§50) of the Act of June 30, 1864, and provided for the remand to the state courts of all pending removed cases which were not removable under the new 1866 removal provisions.

soldiers, loyalists and Negroes.[51] Recognizing the wisdom of this transfer, and intensely aware of the hostility and anti-Union prejudice of the Southern state courts,[52] whose process was being used to harass the unionists and freedmen,[53] that Congress took four important steps to curb the state courts.

*First*, by the Amendatory Freedmen's Bureau Act,[54] it approved and expressly authorized the supersession of

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[51] See General Sickles' order, set out at CONG. GLOBE, 39th Cong., 1st Sess. 1834 (April 7, 1866), providing that military courts "shall have, as against any and all civil courts, exclusive jurisdiction in all cases where freedmen and other persons of color are directly or indirectly concerned, until such persons shall be admitted to the State courts as parties and witnesses with the same rights and remedies accorded to all other persons," unless the Negroes concerned filed a written stipulation submitting the proceeding to the state court. *Cf. id.* at 320 (Jan. 19, 1866) (General Grant's order).

[52] *E.g., id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky), 1527 (remarks of Representatives Garfield and Smith, of Kentucky), 1529 (remarks of Representative Cook) 2054, 2063 (April 20, 1866) (remarks of Senator Clark). Clark pointed out that hostile state legislatures could not be looked to for redress of the discriminations practiced by hostile state judges. *Id.* at 2054. The only relief for the Union men was access to the federal courts: "There is where they are most likely to have their rights protected. There is where local prejudices are frowned down." *Id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky); see *id.* at 1528 (remarks of Representative Smith, of Kentucky), 1529-30 (remarks of Representative Cook); *cf. id.* at 1387 (March 14, 1866) (remarks of Representative Cook). See also the debates on the amendatory freedmen's bureau bills: *id.* at 320 (Jan. 19, 1866) (remarks of Senator Trumbull), 339 (Jan. 22, 1866) (remarks of Senator Cresswell), 744 (Feb. 8, 1866) (remarks of Senator Sherman), 941 (Feb. 20, 1866) (remarks of Senator Trumbull), 657 (Feb. 5, 1866) (remarks of Representative Eliot), 2774-77 (May 23, 1866) (remarks of Representative Eliot).

[53] See text and notes at notes 61-67, *infra*.

[54] Act of July 16, 1866, ch. 200, §14, 14 Stat. 176. Concerning supersession of state civil and criminal jurisdiction by military

state courts by Union military tribunals throughout the South until the rebellious States were restored to order and their representatives readmitted to Congress.[55] In this, the

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tribunals under the act, see DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 147, 156-63 (1898).

[55] Section 14 of the Amendatory Freedmen's Bureau Act, note 54 *supra*, provided that in every State where "the ordinary course of judicial proceedings has been interrupted by the rebellion," or where the State's "constitutional relations to the government have been practically discontinued by the rebellion," certain enumerated rights—an enumeration substantially identical to that of §1 of the Civil Rights Act—should be secured to all citizens without respect to race or color. Where the course of judicial proceedings had been interrupted, the President through the Freedmen's Bureau was to "extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights," this jurisdiction to cease in every State when the state and federal courts therein were no longer disturbed in the peaceable course of justice, and after the State was restored to its constitutional relations and its representatives seated in Congress. The jurisdiction appears of slightly different scope than that given by the first amendatory freedmen's bureau bill, S. 60 of the Thirty-ninth Congress, a companion bill to the civil rights bill, *infra*, which failed of passage over President Johnson's veto. The predecessor bill authorized military jurisdiction over all cases affecting the Negroes, but only when in a State the ordinary course of judicial proceedings had been interrupted by the rebellion *and* the same enumerated rights were discriminatorily denied to Negroes; this jurisdiction to cease "whenever the discrimination on account of which it is conferred ceases," and in any event so soon as the state and federal courts were no longer disturbed and the State's constitutional relations were restored.

In debate on the first bill, Senator Trumbull, who introduced, reported and managed it, CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 184 (Jan. 11, 1866), 209 (Jan. 12, 1866), resisted attacks on the jurisdiction by repeated insistence that the bill operated only where the civil courts were overthrown. *Id.* at 320-22 (Jan. 19, 1866), 347 (Jan. 22, 1866), 937-38 (Feb. 20, 1866). In this he manifested no deference to the state courts, for the principal attack was upon the institution of military tribunals, as distinguished from federal civil tribunals, see, *e.g.*, the President's veto messages set out *id.* at 915-17 (Feb. 19, 1866), 3849-50 (July 16, 1866), and it was to this attack that Trumbull replied. See *id.* at

Thirty-Ninth Congress—like the military commanders before it—intended that nationally responsible courts should sit at the trial level, so that the unionists and freedmen might be protected not only against explicitly discriminatory Southern state statutes, but also against Southern state judicial maladministration of statute law apparently fair on its face.[56]

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322 (Jan. 19, 1866), 937-38 (Feb. 20, 1866). He explained that the civil rights bill applied, and could be enforced, only in parts of the country where the civil courts were functioning; that the amendatory freedmen's bureau bill applied only where they were not. *Id.* at 3412 (June 26, 1866) (debate on the second bill). See also *id.* at 2773 (May 23, 1866) (remarks of Representative Eliot, who reported and managed the second bill, *id.* at 2743 (May 22, 1866), 2772 (May 23, 1866)). And in a speech concerned with both the civil rights and first amendatory freedmen's bureau bills, Trumbull appears to view them as having substantially similar scope. *Id.* at 322-23 (Jan. 19, 1866).

[56] Particularly significant is an order of General Terry in Virginia, March 12, 1866, set out at CONG. GLOBE, 39th Cong., 1st Sess. 1834 (April 7, 1866). The Virginia legislature on February 28, 1866, had passed a statute providing that all laws respecting crimes, punishments, and criminal proceedings should apply equally to Negroes and whites, and that Negroes should be competent witnesses in all cases in which Negroes were involved. General Terry's order thereupon restored to the civil courts the jurisdiction theretofore exercised by the military tribunals in all criminal matters affecting the freedmen, but provided an elaborate system of protection to assure that the Virginia laws would be fairly administered as they were written. Under part III of the order, assistant superintendents of the Freedmen's Bureau were required to attend in person all criminal trials or preliminary hearings in which Negroes were parties or witnesses. Under part IV, the duties of the assistants were spelled out: they were not to interfere with the court, or act as attorneys, although they might make friendly suggestions to the Negroes concerned. "They will, however, make immediate report of any instance of oppression or injustice against a colored party, whether prosecutor or defendant, and also in case the evidence of colored persons should be improperly rejected or neglected." Under part V, the assistants were to examine and report if in any instance a prosecutor, magistrate, or grand jury had refused justice to a colored person by improperly neglecting

*Second,* the same Congress substantially amended the removal procedures under the Habeas Corpus Suspension Act of 1863, *supra,* in order to prevent their obstruction by the state courts. The Act of May 11, 1866, chapter 80,[57] facilitated removal practice;[58] the Act of February 5, 1867,

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a complaint or refusing to receive a sworn information, so that by reason of partiality a trial or prosecution was avoided. Part VI required the assistants to make monthly detailed reports concerning the effect of the order on the interests of Negroes, "whether they have been treated with impartiality and fairness, and the law respecting their testimony carried out in good faith or otherwise." General Grant's order of January 12, 1866, had directed the commanders to protect Negroes from prosecution in the rebel States "charged with offenses for which white persons are not prosecuted or punished in the same manner and degree." *Id.* at 320 (Jan. 19, 1866). Senator Trumbull, questioned concerning Grant's order, said that he did "indorse the order and every word in it." *Ibid.*

[57] 14 Stat. 46.

[58] Section 1 of the Act of May 11, 1866, declared that any act or omission under authorized military order came within the purview of the sections of the act of 1863 which made acts or omissions under presidential order immune from civil and criminal liability and allowed removal to the federal courts by defendants charged in state courts in respect of such acts. 14 Stat. 46. The section was responsive to state court decisions requiring that a defendant produce an order from the President himself in order to come within the 1863 act. CONG. GLOBE, 39th Cong., 1st Sess. 1387 (March 14, 1866) (remarks of Representative Cook, who reported the bill, *id.* at 1368 (March 13, 1866), and was its floor manager, *id.* at 1387 (March 14, 1866)). Section 2 of the 1866 act specified the means by which the millitary order relied on might be proved. Section 3 extended the time for removal up to the point of empaneling a jury in the state court, and eliminated the 1863 requirement of a removal bond. Section 4 directed that upon the filing of a proper removal petition all state proceedings should cease, and that any state court proceedings after removal should be void and all parties, judges, officers, or other persons prosecuting such proceedings should be liable for damages and double costs to the removing party. 14 Stat. 46. Section 5 directed the clerk of the state court to furnish copies of the state record to a party seeking to remove, and permitted that party to docket the removed case

chapter 27,[59] authorized the issuance of writs of habeas corpus *cum causa* by the federal courts to bring before them any imprisoned defendants whose cases had been removed.[60] The debates on the first of these remedial enactments are particularly revealing: they demonstrate beyond peradventure Congress' distrust of, and unwillingness to leave the vindication of federal interests to, the state judiciary. "Now, it so happens, as the rebellion is passing away, as the rebel soldiers and officers are returning to their homes, that I may say thousands of suits are springing up all through the land, especially where the rebellion prevailed, against the loyal men of the country

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in the federal court without attaching the state record in case of refusal or neglect by the state court clerk. 14 Stat. 46-47. These latter provisions were intended to alter procedural requirements upon which the state courts had seized to obstruct removal. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1387-88 (March 14, 1866) (remarks of Representative Cook), 2054 (remarks of Senator Clark, who reported the bill, *id.* at 1753 (April 4, 1866), and was its floor manager, *id.* at 1880 (April 11, 1866)).

[59] 14 Stat. 385.

[60] The act was reported by the Judiciary Committee in each house. CONG. GLOBE, 39th Cong., 1st Sess. 4096 (July 24, 1866) (House), 4116 (Senate). Its purpose was to take from state custody defendants whose cases had been removed into the federal courts, *id.* at 4096 (July 25, 1866) (remarks of Representative Wilson, who reported the bill and was its floor manager, *ibid.*); CONG. GLOBE, 39th Cong., 2d Sess. 729 (Jan. 25, 1867) (remarks of Senator Trumbull, chairman of the Judiciary Committee, who reported the bill, CONG. GLOBE, 39th Cong., 1st Sess. 4116 (July 24, 1866), and was its floor manager, CONG. GLOBE, 39th Cong., 2d Sess. 729 (Jan. 25, 1867)), and thereby to permit the federal court to determine the validity of the defendant's detention under arrest, *ibid.* (remarks of Senator Johnson).

The civil rights removal provisions of the Act of April 9, 1866, ch. 31, §3, 14 Stat. 27, *infra*, adopted the procedures of the 1863 removal sections "and all acts amendatory thereof."

who endeavored to put the rebellion down."[61] "[S]uits are springing up from one end to the other; and these rebel courts are ready to decide against your Union men and acquit the rebel soldier."[62] "A great many vexatious suits have been brought, and they are still pending, and instances have been known—they exist now—where Federal officers have been pushed very hard and put to great hardships and expense, and sometimes convicted of crime, for doing things which were right in the line of duty, and which they were ordered to do and which they could not refuse to do."[63] In Kentucky, "they are harassing, annoying, and

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[61] CONG. GLOBE, 39th Cong., 1st Sess. 2021 (April 18, 1866) (remarks of Senator Clark). Senator Clark reported and managed the bill which became the act. Note 58 *supra*.

The oppressive volume of state litigation against Union men was frequently noted in debate. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1880 (April 11, 1866) (remarks of Senator Clark), 1983 (April 17, 1866) (remarks of Senator Trumbull, Chairman of the Judiciary Committee): It was said that there were over 3000 cases pending in Kentucky alone. *Id.* at 1526, 1529 (March 20, 1866) (remarks of Representative McKee, of Kentucky), 1983 (April 17, 1866) (remarks of Senator Clark), 2021 (April 18, 1866) (remarks of Senator Clark), 2054 (April 20, 1866) (remarks of Senator Wilson).

[62] *Id.* at 2021 (April 18, 1866) (remarks of Senator Clark).

[63] *Id.* at 1880 (April 11, 1866) (remarks of Senator Clark). Recognition that the cost of defending suits and prosecution might itself be ruinous to defendant Union men found strong expression in the comments of Senators Edmunds, *id.* at 2063, 2064 (April 20, 1866), and Howe, *id.* at 2064, in debate of an amendment offered by Edmunds providing that the Secretary of War should defend all actions within the scope of the bill at government expense, and should indemnify the individual defendant for damages, costs, fines and expenses. The amendment was opposed on the ground that it would overburden the Government's financial resources, encourage litigation, encourage collusive actions, result in larger jury verdicts in damage actions, and that defendants could be adequately protected by private indemnifying bills. Both Edmunds' amendment and one by Howe providing for government defense of removed actions, were defeated. *Id.* at 2064-66. Apart from questions of expense, the injury to state-court defendants resulting from delay

even driving out of the State the men who stood true to the flag by suits under the legislation and judiciary rulings of Kentucky. There no protection is guaranteed to a Fed-

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in the vindication of their federal rights was pointed up by the debate between Senators Doolittle and Hendricks, who opposed the provision making state judges civilly liable for proceeding after removal of a cause to the federal court, and Senators Stewart and Clark, who supported it. Senator Doolittle said that it should not be presumed state judges would flout the federal removal statute. Senator Stewart asked, in effect, what relief there was for an indicted defendant if the state court did flout removal, pointing out that a state judge could force an indictment to trial even without the cooperation of the state prosecutor.

MR. HENDRICKS. The Senator as a lawyer knows that this will be the effect of it: if the application takes away the jurisdiction of the State courts then the remedy, of course, if the plaintiff persists in the case, is in the appellate courts, and finally, on an appeal, in the Supreme Court of the United States, inasmuch as the validity of this law, an act of Congress, would be in question.

MR. STEWART. But suppose the judge goes on and convicts the man and sends him to the penitentiary, he must lie there until the case can be heard in the Supreme Court, three or four years hence.

MR. DOOLITTLE. How can he send him to the penitentiary? No officer is allowed to do it. Will the judge put him there himself?

MR. STEWART. The judge can order the officer to put him there.

MR. DOOLITTLE. What if he does if the officer cannot put him there? If every officer to execute a decree of the court is made responsible, how can the judge do it?

MR. STEWART. The judge has jurisdiction over the officer, and he can order him to do it, and if he does not do it the judge can call upon the power of the State if he has jurisdiction.

MR. CLARK. I desire to make but one suggestion in answer to the Senator from Wisconsin, and that is one of fact. He says if it were necessary that these judges should be proceeded against he would not object. I hold in my hand a communication from a member of the other House from Kentucky, in which he says that all the judicial districts of Kentucky, with the exception of one, are in the hands of sympathizing judges.

*(footnote continued on following page)*

eral soldier." [64] "[I]n another county of that State the grand jury indicted every Union judge, sheriff, and clerk of the election of August, 1865. In addition to that every loyal man who had been in the Army and had, under the order of his superior officer, taken a horse, was indicted." [65] Discrimination against the Union men "is the rule in Kentucky, except in one solitary district, and the Legislature at its last session inaugurated means of removing that judge, simply because he dared to carry out this act of the Federal Congress [the 1863 removal statute]." [66] "There must be some way of remedying this crying evil, and these men who have been engaged in the defense of the country cannot be permitted to be persecuted in this sort of way. Their life becomes hardly worth having, if, after having driven the rebels out of their country and subdued them, those rebels are to be permitted to return and harass them from morning until night and from night till morning, and make their life a curse for that very defense which they have given your country." [67]

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> They entirely disregard the act to which this is an amendment. They refuse to allow the transfer, and proceed against these men as if nothing had taken place. Here is not the assumption that these judges will not do this; here is the fact that they do not do it, and it is necessary that these men should be protected.

*Id.* at 2063 (April 20, 1866). Senators Stewart and Clark prevailed in the vote on an amendment seeking to strike the provision making the state judges liable. *Ibid.*

[64] *Id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

[65] *Id.* at 1527 (remarks of Representative Smith, of Kentucky). See *id.* at 1526 (remarks of Representative McKee, of Kentucky).

[66] *Id.* at 1526; see *id.* at 2063 (April 20, 1866) (remarks of Senator Clark).

[67] *Id.* at 2054.

*Third,* the Thirty-Ninth Congress extended the federal habeas corpus jurisdiction to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . .,"[68] made elaborate provision for summary hearing and summary disposition by the federal judges, and provided that:

> pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.[69]

This statute was designed "to enlarge the privilege of the writ of *hobeas* [sic] *corpus,* and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them,"[70] to give

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[68] Act of February 5, 1867, ch. 28, 14 Stat. 385.

[69] Act of February 5, 1867, ch. 28, §1, 14 Stat. 386. The successor to this provision is present 28 U. S. C. §2251 (1964), which authorizes any federal justice or judge before whom a habeas corpus proceeding is pending, to "stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding," before judgment, pending appeal, or after final judgment of discharge in the habeas case. State proceedings after granting of a stay are declared void, but if no stay is granted state proceedings are "as valid as if no habeas corpus proceedings or appeal were pending."

[70] Cong. Globe, 39th Cong., 1st Sess. 4151 (July 25, 1866) (remarks of Representative Lawrence, who reported the bill and was its manager in the House).

any person "held under a State law in violation of the Constitution and laws of the United States . . . recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States." [71] It was "legislation . . . of the most comprehensive character [bringing] . . . within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." [72] Recent exhaustive study of the history of the 1867 habeas corpus statute confirms that its purpose was to give a summary and imperious federal judicial procedure for the pretrial abortion of state criminal proceedings,[73] and thoroughly supports this Court's observation that "Congress seems to have had no thought . . . that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review by [the Supreme Court] . . .—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged." *Fay* v. *Noia*, 372 U. S. 391, 416 (1963). See also, *In re Neagle*, 135 U. S. 1 (1890).

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[71] *Id.* at 4229 (July 27, 1866) (remarks of Senator Trumbull, Chairman of the Judiciary Committee, who reported the bill and was its manager in the Senate, *id.* at 4228).

[72] *Ex parte McCardle*, 73 U. S. (6 Wall.) 318, 325-26 (1868).

[73] Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). This article is concerned with the federal civil rights removal jurisdiction as well as with federal habeas corpus power to anticipate state criminal trials. The historical materials and some of the arguments in this brief are supported by the article.

*Fourth,* and most significant, on April 9, 1866, Congress enacted the first major civil rights act.[74] Its third section, the ancestor of the present 28 U. S. C. §1443 (1958), on which defendants rely to sustain removal, provided:

> Sec. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedman and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and

[74] Act of April 9, 1866, ch. 31, 14 Stat. 27.

> circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.[75]

The purpose of this 1866 act—"An Act to protect all Persons in the United States in their Civil Rights and to furnish the Means of their Vindication"—was to upset the *Dred Scott* decision[76] by declaring the Negroes citizens, to establish as an incident of that citizenship "the same right" to contract, hold property, etc., and "to full and equal benefit of all laws and proceedings for the security of person and property" as enjoyed by whites (section 1),[77]

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[75] Act of April 9, 1866, ch. 31, §3, 14 Stat. 27.

[76] *Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857).

[77] Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory

to deter by criminal penalties the deprivation of that "right" (section 2),[78] and to give the Negroes access to federal courts for protection of the right (section 3).[79] The structure of section 3 was: (1) to create original federal jurisdiction in the case of persons who were denied or could not enforce their §1 rights in the state courts; (2) to create removal jurisdiction in cases where any "such person" was sued or prosecuted in a state court; and (3) to create additional removal jurisdiction over suits or prosecutions against persons on account of alleged wrongs committed under color of the 1866 act or the Freedmen's Bureau Acts. Little appears in the legislative history, however, that is helpful in precise construction of any of these jurisdictional grants.[80] Since the basic substantive right given by

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in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[78] Act of April 9, 1866, ch. 31, §2, 14 Stat. 27, made it criminal for any person, acting under color of law, to subject another to deprivation of any right secured or protected by the act (see §1, note 77, *supra*), or to different punishments, pains, or penalties by reason of race, color, or previous servitude. The section is the forebear of present 18 U. S. C. §242 (1964).

[79] Act of April 9, 1866, ch. 31, §3, 14 Stat. 27.

[80] Except for the words which now appear as the last clause of 28 U. S. C. §1443(2) (1964), allowing removal of actions or prosecutions "for refusing to do any act on the ground that it would be inconsistent with [federal] . . . law [providing for equal civil rights]."

The language "or for refusing to do any act on the ground that it would be inconsistent with this act" was added to the Senate bill by a House amendment. CONG. GLOBE, 39th Cong., 1st Sess., 1366

section 1 of the act was a right of equal treatment under state laws and proceedings, it was an obvious shorthand description of the scope of section 3 to say that it covered "the cases of persons who are discriminated against by State laws or customs," [81] persons "whose equal civil rights are denied . . . in the State courts," [82]—and these were the expressions used by Senator Trumbull, who more than any other one man was the guiding force behind the Civil Rights Act,[83] and who gave the only systematic exposition of its judiciary provisions found in the debates.[84] In the con-

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(March 13, 1866); see *id.*, at 1413 (March 15, 1866). Compare *id.* at 211 (Jan. 12, 1866) (original Senate bill). The purpose of the amendment was stated by Representative Wilson, House Judiciary Committee chairman and floor manager of the bill, in reporting it from his committee, as follows:

> Mr. Wilson, of Iowa.
>
> I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws . . .

*Id.* at 1367 (March 13, 1866). There was no other pertinent discussion of the provision.

[81] *Id.* at 475 (Jan. 29, 1866) (remarks of Senator Trumbull).

[82] *Ibid.*

[83] Senator Trumbull, who was Chairman of the Judiciary Committee, introduced the bill (S. 61), and had it referred to his committee. *Id.* at 129 (Jan. 5, 1866). He reported the bill from committee, *id.* at 184 (Jan. 11, 1866), and managed it on the Senate floor, see *id.* at 474 (Jan. 29, 1866). Throughout the debates he played a leading role, fully commensurate with his moral and political ascendancy over the Thirty-Ninth Congress.

[84] See Senator Trumbull's key speech urging the bill's passage over veto, CONG. GLOBE, 39th Cong., 1st Sess. 1759 (April 4, 1866):

> The President objects to the third section of the bill . . . [H]e insists [that it] gives jurisdiction to all cases affecting persons discriminated against, as provided in the first and

text of Congress' concern with the *substantive* question of denials of equality, this language plainly does not mean that the removal jurisdiction depended upon a showing of actual denial or discrimination by the state courts: the very text of the statute reaches prosecutions both against

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second sections of the bill; and by a strained construction the President seeks to divest State courts, not only of jurisdiction of the particular case where a party is discriminated against, but of all cases affecting him or which might affect him. This is not the meaning of the section. I have already shown, in commenting on the second section of the bill, that no person is liable to its penalties except the one who does an act which is made penal; that is, deprives another of some right that he is entitled to, or subjects him to some punishment that he ought not to bear.

So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, presumption being that the judge of the court when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid.

If it be necessary in order to protect the freedmen in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him,

persons "who are denied" and those who "cannot enforce" their rights in the state tribunals. In any event, it is plain that Trumbull was summarizing only part of the jurisdiction granted by section 3: the jurisdiction under the clauses affecting persons "who are denied or cannot enforce" their federal claims (now 28 U. S. C. §1443(1) (1964)).[85] The jurisdiction over persons acting "by virtue or under color of authority" of the 1866 Act or the Freedmen's Bureau Acts (now 28 U. S. C. §1443(2) (1964)), remains unilluminated.

However, one point does emerge clearly from the debates and from the original statutory language. Contrary to the construction which this Court was subsequently to put on the "denial" clause (present §1443(1)) in a series of cases between *Virginia* v. *Rives*, 100 U. S. 313 (1880), and *Kentucky* v. *Powers*, 201 U. S. 1 (1906), see pp. 74-85, *infra*, Congress did not intend that removal be allowed only where state *statutory* law, federally unconstitutional on its face, denied a criminal defendant's federally protected rights. Certainly it is true that Southern resistance to the Thirteenth Amendment first took the form of Black Codes—statutory regulations directed expressly against the freed-

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I think we have the authority to confer that jurisdiction under the second clause of the constitutional amendment, which authorizes Congress to enforce by appropriate legislation the article declaring that "neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States or in any place subject to their jurisdiction." That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, would have authority to allow him to come to the Federal courts in all cases.

[85] See note 84, *supra*.

man.[86] It is also true that a major purpose of the act of 1866 was to counteract the Black Codes,[87] and although the *Rives-Powers* doctrine was never put on this ground by the Court, congressional concern over the Codes might be thought to support the doctrine. It does not, for several reasons.

First, the Black Codes were viewed by the 1866 Congress as overwhelming evidence that the Southern States, unless restrained by the federal government, would discriminate against the Negro and deprive him of his rights; in this light they were discussed as proof of the need for federal action, but not as its exclusive target.[88] Plainly, Congress

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[86] For typical Black Code provisions, see 2 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 2-7 (6th ed. 1958); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (photo reprint 1960); MCPHERSON, POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29-44 (1871).

[87] The Codes were often referred to in debate. In the Senate: CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (Trumbull); 602 (Feb. 2, 1866) (Lane), 603 (Wilson), 605 (Trumbull), 1759 (April 4, 1866) (Trumbull); in the House: *id.* 1118 (March 1, 1866) (Wilson), 1123-24 (Cook), 1151 (March 2, 1866) (Thayer), 1160 (Windom), 1267 (March 8, 1866) (Raymond). See also, *id.* at 340 (Jan. 22, 1866) (remarks of Senator Wilson on the amendatory freedmen's bureau bill).

[88] See the portions of the debates cited in note 87 *supra*, especially CONG. GLOBE, 39th Cong., 1st Sess. 603, 605, 1118, 1160. See also *id.* at 744-45 (Feb. 8, 1866) (remarks of Senator Sherman on the amendatory freedmen's bureau bill). And see *id.* at 1124, 1125 (March 1, 1866) (remarks of Representative Cook):

> Can any member here say that there is any probability, or any possibility, that these States will secure him in those rights? They have already spoken through their Legislatures; we know what they will do; these acts, which have been set aside by the military commanders, are the expressions of their will.
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> * * * * *
>
> . . . Every act of legislation, every expression of opinion on their part proves that these people would be again enslaved if they were not protected by the military arm of the Federal Government; without that they would be slaves today.

anticipated massive Southern resistance to the Thirteenth Amendment, resistance not alone by legislation but by every means at southern state command.

> It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.[89]

Second, the Black Codes which concerned Congress were not all discriminatory and hence unconstitutional[90] on their face. Much mention was made in the debates of the Southern vagrancy laws[91] and particularly of the vagrancy law of Virginia,[92] for example, which was a color-blind statute[93]

[89] *Id.* at 503 (Jan. 30, 1866) (remarks of Senator Howard).

[90] The legislators who enacted the 1866 act regarded discriminatory legislation as unconstitutional by force of the thirteenth amendment.

[91] See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1123-24 (March 1, 1866) (remarks of Representative Cook), 1151 (March 2, 1866) (remarks of Representative Thayer).

[92] *Id.*, at 1160 (March 2, 1866) (remarks of Representative Windom), 1759 (March 4, 1866) (remarks of Senator Trumbull).

[93] See Acts of Virginia, 1865-1866, at 91 (1866) (Act of Jan. 15, 1866).

whose evil lay in its systematically discriminatory application to the Negroes.[94]

Third, there is affirmative evidence that Congress was aware of and intended to redress nonstatutory denials of federal constitutional rights. Senator Trumbull told the Senate in his principal speech urging passage of the bill over President Johnson's veto:

> In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense. Does [section 2 of the 1866 act] . . . propose to punish the community where the custom prevails?
>
> Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.[95]

Congress knew, as we have heretofore seen, that the Union military commanders, recognizing the susceptibility to unfair and discriminatory application of Southern laws apparently fair on their faces, had taken steps to protect the freedmen against such maladministration by the provision of military tribunals to supersede the civil courts in freed-

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[94] Senator Wilson told the Senate that General Terry, as commander in Virginia, "seeing that the vagrant laws of that State were used to make slaves of men whom we have made free," had prohibited the enforcement of the law against Negroes. CONG. GLOBE, 1st Sess., 603 (Feb. 2, 1866). Terry's order is found in McPherson, *op. cit. supra*, note 86 at 41-42.

[95] CONG. GLOBE, 39th Cong., 1st Sess. 1758 (April 4, 1866). See also *id.* at 623 (Feb. 3, 1866) (remarks of Representative Kelley on the amendatory freedmen's bureau bill).

men's cases.[96] Congress adopted this policy itself in the Amendatory Freedmen's Bureau Act (companion legislation to the Civil Rights Act of 1866),[97] and it is implausible to suppose that the permanent civil rights legislation was intended to give the freedmen less substantial protection. Section 3 of the Civil Rights Act provided that removal might be had by persons "who are denied or cannot enforce in the courts or judicial tribunals of the State *or locality where they may be* any of the rights secured to them by the first section of this act." (Emphasis added.) This reference to locality strongly suggests that something less than statutory obstruction to the enforcement of federal rights in the State courts was thought sufficient to support removal.[98] The rights enumerated in section 1, included "full and equal benefit of all laws and *proceedings* for the security of person and property, as is enjoyed by white citizens . . . , any law, statute, ordinance, regulation, or *custom*, to the con-

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[96] See text and notes at notes 51-56, *supra*.

[97] The Amendatory Freedmen's Bureau Act was H. R. 613 of the Thirty-Ninth Congress. A predecessor bill, S. 60, was introduced by Senator Trumbull and reported by the Senator from the Judiciary Committee contemporaneously with S. 61, which became the Civil Rights Act of 1866. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 184 (Jan. 11, 1866).

[98] The "locality" provision was rephrased in REV. STAT. §641 (1875), pp. 69-70, *infra*, which turned removal on the inability to enforce federal rights "in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending . . ." This wording was carried forward in §31 of the Judicial Code of 1911, and appears in 28 U. S. C. §74 (1940). In the 1948 revision it was "omitted as unnecessary," Reviser's Note, p. 70 *infra*, presumably on the theory that one who may remove from "a State Court" may thereby remove from the court of any locality of a State. The omission tokens no substantive change in the statute.

trary notwithstanding." (Emphasis added.)[99] "Proceedings" was certainly intended to add something to "laws," and the inclusion of reference to "custom" was not inadvertent. Senator Trumbull several times told the Senate that it was intended to allow removal "in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against [the freedmen] . . . ."[100] The Senator expressly said that it was not the existence of a statute, any more than of a custom discriminating against the freedman, that constituted such a failure of state process as would authorize removal; but in each case, custom or statute, it was the probability that the state court would fail adequately to enforce federal guarantees.[101] Senator Lane of Indiana similarly said that the evil to be remedied was not unconstitutional state legislation, but the probability that the state courts would not enforce the constitutional rights of the freedmen.[102]

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[99] Section 1 of the 1866 act was re-enacted, with its "notwithstanding" clause, by §§16 and 18 of the Enforcement Act of 1870 Act of May 31, 1870, 16 Stat. 144. It appears in REV. STAT. §1977 (now 42 U. S. C. §1981 (1964)), without the "notwithstanding" clause. A similar clause was omitted by the revisers in carrying forward §1 of the Act of April 20, 1871, 17 Stat. 13, as REV. STAT. §1979 (now 42 U. S. C. §1983 (1964)). In neither case does any intention appear to effect a substantive change. The "notwithstanding" clauses, although indicative of legislative purpose in respect of some applications of the statute—as here—never were effective provisions, since the supremacy clause of the Constitution made them unnecessary.

[100] CONG. GLOBE, 39th Cong., 1st Sess. 1759 (April 4, 1866); *id.* at 475 (Jan. 29, 1866); cf. *id.* at 1758 (April 4, 1866). See also *Blyew* v. *United States*, 80 U. S. (13 Wall.) 581, 593 (1871).

[101] See note 84, *supra*.

[102] CONG. GLOBE, 39 Cong., 1st Sess. 602-03 (Feb. 2, 1866). See also *id.* at 1265 (March 8, 1866) (remarks of Representative Broomall).

> One of the distinguished Senators from Kentucky [Mr. Guthrie] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.
>
> But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.

In 1870 and 1871, Congress enacted the second and third Civil Rights Acts.[103] The 1870 statute was primarily Fifteenth Amendment legislation; it declared the right of all otherwise qualified citizens to vote without racial discrimination,[104] penalized interference with the franchise,[105] and created federal civil and criminal jurisdiction in all cases arising under the act.[106] In its sixteenth and seventeenth sections, designed to reestablish on Fourteenth Amendment footing the pre-Fourteenth Amendment Civil Rights Act of 1866, it reenacted with some extensions the first and

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[103] Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of April 20, 1871, ch. 22, 17 Stat. 13.

[104] Act of May 31, 1870, ch. 114, §1, 16 Stat. 140.

[105] Act of May 31, 1870, ch. 114, §§2-7, 16 Stat. 140.

[106] Act of May 31, 1870, ch. 114, §8, 16 Stat. 142.

second sections of that Act,[107] and in its eighteenth section, it reenacted by reference the whole of the 1866 act, "Sections sixteen and seventeen hereof [to] . . . be enforced according to the provisions of said act."[108]

The 1871 statute went further, putting the remedial provisions of the 1866 act to broad new uses. This "Act to enforce the Provisions of the Fourteenth Amendment . . ." was designed to establish general federal civil rights jurisdiction superseding state judicial processes without respect to exhaustion of state remedies, "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[109] Its first section provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such

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[107] Act of May 31, 1870, ch. 114, §§16-17, 16 Stat. 144.

[108] Act of May 31, 1870, ch. 114, §18, 16 Stat. 144.

[109] *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961). The purpose of the 1871 act to provide a federal forum for the vindication of federal civil rights notwithstanding failure to exhaust state remedies was reaffirmed in *McNeese* v. *Board of Educ.*, 373 U. S. 668 (1963) (alternative ground).

> proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.[110]

Also, in 1871, Congress amended the Second Civil Rights Act of 1870, adding detailed administrative provisions for the enforcement of voting rights. Here again it authorized removal of suits or prosecutions against officers or persons acting under the amendatory statute.[111]

Four years later the last major Civil Rights Act of the Nineteenth Century was enacted, affirming the right of Negroes to equal public accommodation. Like its predecessors, the statute contained jurisdictional provisions making the federal trial courts the agencies of its enforcement.[112] In the same year the Judiciary Act created general federal question jurisdiction in original and removed civil actions,[113] thereby for the first time permanently establishing a federal trial forum for every litigant engaged in a significant civil controversy based on a claim arising under the federal

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[110] Act of April 20, 1871, ch. 22, §1, 17 Stat. 13. These provisions are carried forward in part in present 28 U. S. C. §1343(3) (1964); Rev. Stat. §1979 (1875), 42 U. S. C. §1983 (1964).

[111] Act of Feb. 28, 1871, ch. 99, §16, 16 Stat. 438.

[112] Act of March 1, 1875, ch. 114, 18 Stat. 335.

[113] Act of March 3, 1875, ch. 137, §§1-2, 18 Stat. 470.

constitution and laws.[114] Save for petty controversies, federal trial jurisdiction was now made coextensive with the concern for effective enforcement of national law; on the widest front, Congress gave expression to the assumption of Hamilton and Madison that federal judges "are more likely to give full scope to any given Supreme Court decision and particularly ones unpopular locally, than are their state counterparts."[115]

The Revised Statutes of 1875, then, carried forward extensive new grants of federal trial jurisdiction created during the preceding dozen years, among them the civil rights removal statutes, codified with some change of language in section 641:

> Sec. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defen-

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[114] See 28 U. S. C. §§1331, 1441 (1964).

[115] Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 158 (1953).

> dant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided.

In 1911, in the course of abolishing the old Circuit Courts, Congress technically repealed Rev. Stat. §641 (Judicial Code of 1911, ch. 231, §297, 36 Stat. 1168), but carried its provisions forward without change (except that removal jurisdiction was given the district courts in lieu of the circuit courts) as §31 of the Judicial Code (Judicial Code of 1911, ch. 231, §31, 36 Stat. 1096). Section 31 verbatim became 28 U. S. C. §74 (1940), and in 1948, with changes in phraseology, it assumed its present form as 28 U. S. C. §1443 (1964). The reviser's note to §1443 indicates that no substantive changes were intended. H. R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947).

There is no blinking the message of this history. As a result of the Reconstruction legislation, representing a radical change of Congressional attitude toward the States and particularly the state courts, the federal trial courts assumed the role in which the most foresighted members of the Constitutional Convention had cast them—as the necessary, the indispensable instruments for the enforcement of federal rights.[116] The Thirteenth, Fourteenth, and Fifteenth Amendments had now written into the Constitution broad new national guarantees of liberty and equality, committing

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[116] Frankfurter & Landis, *The Business of the Supreme Court* 64-65 (1927).

the federal government to protect the individual against the States. The four major civil rights acts had undertaken to establish the new liberties and each of the acts made the federal trial courts the front line of federal protection. Power had been given those courts in civil actions to enjoin or redress every deprivation by the States of "rights, privileges, or immunities secured by the Constitution," using every remedial device known to federal law.[117] Habeas corpus, "the most celebrated writ in the English law," [118] "the great and efficacious writ in all manner of illegal confinement," [119] was given the federal judges "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law." [120] No longer reluctant to disrupt state criminal prosecutions which had proved potent instruments of harassment, Congress had enacted criminal removal statutes in 1863 and 1866 covering cases arising out of the Civil War, in 1864 and 1866 covering cases arising out of enforcement of the wartime revenue acts, in 1866 covering cases of all persons prosecuted for acts under color of authority of civil rights law and all persons who could not enforce their newly given civil rights in the state courts, in 1871 covering voting enforcement cases. Plainly, it seemed that the Reconstruction Congresses had accomplished their principal nationalizing

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[117] Section 1 of the Ku Klux Klan Act of 1871. See also the broad authorization of Rev. Stat. §722 (1875), 42 U. S. C. §1988 (1964), deriving from §3 of the first Civil Rights Act; *Lefton* v. *Hattiesburg*, 333 F. 2d 280 (5th Cir. 1964); *Brazier* v. *Cherry*, 293 F. 2d 401 (5th Cir.), (1961); *Pritchard* v. *Smith*, 289 F. 2d 153 (8th Cir. 1961).

[118] 3 BLACKSTONE, COMMENTARIES 129 (6th ed., Dublin 1775).

[119] *Id.* at 154.

[120] Act of February 5, 1867, ch. 28, §1, 14 Stat. 386.

purpose: the effective protection of freedoms won in battle and secured against state action by the post-war constitutional amendments and statutes, through the extension of the sheltering arm of a plenary federal trial court jurisdiction.

Yet what the Reconstruction Congresses had painstakingly achieved was beclouded by a series of decisions of the post-Reconstruction Supreme Court of the United States. Those decisions are far narrower than has frequently been supposed—all, as will be shown in the next section of this brief, speak to a single, very limited issue—but the opportunity which the Court's opinions gave to the federal district courts to disembarrass themselves of unwanted business was widely seized upon; the district courts extended the Supreme Court's removal decisions unwarrantedly; the result was virtual judicial repeal of what is now 28 U. S. C. §1443(1) (1964). And, because remand orders were thought to be nonappealable between 1887 and 1964, the lower courts' construction of the removal statute stood and froze.

In the Civil Rights Act of 1964, congressional reaction to that construction was expressed. With the palpable purpose of undoing the district courts' decisions which had made a worthless nullity of the civil rights removal statute,[121] Con-

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[121] See, e.g., 110 CONG. REC. 6551 (March 30, 1964) (remarks of Senator Humphrey), 6564 (remarks of Senator Kuchel). And see particularly *id.* at 6955 (April 6, 1964) (remarks of Senator Dodd):

> An examination of the legislative history of the act of 1866, which first authorized such removals, of the language of that act and its successors, and of the apparent congressional purpose clearly suggests that these old interpretations are erroneous . . .
>
> Accordingly the removal statute, intended by Congress to be . . . one of the great bulwarks of equality, is of little or

gress made civil rights remand orders appealable.[122] The freeze was broken, and the invocation of that new appellate jurisdiction brings the present cases to this Court.

**2. *Judicial Background***

The body of this Court's decisions dealing with civil rights removal remains to be considered. All are concerned with the predecessor of present 28 U. S. C. §1443(1) (1964). The provision that is now §1443(2) has never been before the Court.

The predecessor of §1443(1)[123] was first construed by the Supreme Court in 1880, in *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). There, the Court sustained removal on the petition of a Negro indicted for murder in a West Virginia court which alleged that by reason of an 1873 West Virginia statute restricting eligibility for jury service to white males, Negroes were excluded from grand and petit juries in the courts of that State. Strauder was adjudged a person who is "denied" or who "cannot enforce" his federal equal civil rights. Since his removal petition was filed (as

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no value today . . . If an appeal is allowed from orders to remand, the appellate courts will be able to consider what the removal statute means and what Congress intended when it enacted the statute.

In recent months and years a number of cases have arisen which could properly have been removed from State to Federal court if the original intention of Congress had been permitted to govern.

[122] 28 U. S. C. §1447(d), as amended by §901, Civil Rights Act of 1964, 78 Stat. 241, 266.

[123] The provision was then Rev. Stat. §641 (1875). In the concept presently material—the concept of a person "denied or [who] cannot enforce" rights in the state courts—the statute has remained unchanged from 1866 to the present.

it had to be) before state trial[124] and was sufficient, if ever, at that time, the Court clearly held that the potential applicability of an unconstitutional state statute to his case gave Strauder grounds for removal without inquiry into possibility that the state courts might sustain his constitutional claim and void the unconstitutional state legislation, as the supremacy clause obliged them to do. The state statute directed the state judges to an unconstitutional conclusion, and the Supreme Court found the conditions of removability satisfied.

But, in *Virginia* v. *Rives*, 100 U. S. 313 (1880), decided the same day, removal was denied. In *Rives* a federal trial court assumed removal jurisdiction on a petition alleging that petitioners were Negroes charged with murder of a white man; that there was strong race prejudice against them in the community; that the grand jury which indicted them and the jurors summoned to try them were all white;

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[124] Rev. Stat. §641 (1875) required that a petition for removal be filed "at any time before the trial or final hearing of the cause." Present 28 U. S. C. §1446(c)(1964) requires filing "at any time before trial." This pretrial character of the removal procedure, which played a significant part in the construction given the civil rights removal statute in and following *Virginia* v. *Rives*, 100 U. S. 313 (1880), appears not to have been an incident of the procedure authorized by the original 1866 act. That act contained no independent procedural provisions, but adopted by reference the removal procedures of the Habeas Corpus Suspension Act of March 3, 1863, ch. 81, §5, 12 Stat. 755, 756. The 1863 act had authorized removal either before trial, 12 Stat. 756, *or after judgment*, 12 Stat. 757; from the 1866 language, *both* these forms of removal were meant to be carried over to civil rights cases. See Senator Trumbull's speech set out in note 84 *supra*. The Act of May 11, 1866, ch. 80, §3, 14 Stat. 46 amended the 1863 procedures to authorize pretrial removal at any time before empaneling of a jury in the state court. Although this act explicitly provided that it did not affect post-judgment removal, Rev. Stat. §641 failed to carry that form of removal forward in civil rights cases.

that the prosecutor and judge had refused petitioners' request that one-third of the trial jury be composed of Negroes; that, notwithstanding the state laws required jury service of males without discrimination of race, Negroes had never been allowed to serve as jurors in the county in any case in which their race was interested.

The State of Virginia sought a writ of mandamus in the Supreme Court to compel the lower federal court to remand the case, and the Supreme Court issued the writ. Its opinion, read narrowly, found that petitioners' allegations "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected." [125] There was wanting, as a matter of pleading (in those early days before the Court's experience in the trial of jury discrimination claims bred the "prima facie" showing doctrine),[126] an allegation of purposeful or intentional discrimination, and the Court said that this might have been supplied by averment that a statute of the State barred Negroes from jury service. "When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal." [127] Thus, by reason of the requirement of

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[125] 100 U. S. at 322.

[126] See, e.g., *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964).

[127] 100 U. S. at 321.

a factual showing under the removal statute that a defendant could not enforce his federal rights in the state court,[128] the Court said that the inability to enforce federal rights of which the removal statute speaks "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case."[129]

So construed, *Rives* held no more than that the removal petitioners' allegations were insufficient to state a claim of unconstitutional jury discrimination under the standards then prevailing, and its comments on the existence or nonexistence of discriminatory legislation were merely speculation on sorts of allegations which would be sufficient. But the case could also be read rather loosely as saying that unless a state constitution or statute on its face denied a defendant's federal constitutional rights, his case was not removable under present subsection 1443(1).[130]

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[128] But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case comes to trial he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case.

*Id.* at 320. Elsewhere the Court treated the problem as one of showing that a defendant's rights are denied *"in the judicial tribunals of the State," id.* at 321 (emphasis in original), within the meaning of the statute, merely another manner of stating the same concern.

[129] *Id.* at 319.

[130] The Court also said: "In other words, the statute has reference to a legislative denial or an inability resulting from it." *Id.* at 319-320.

Without adequate consideration of the point, the Court in *Neal* v. *Delaware*[131] took this latter view of *Rives*. Like *Rives*, the *Neal* case involved a Negro defendant indicted for a capital offense. His removal petition alleged that Negroes were systematically excluded from grand and petit juries in the state courts, and that this exclusion was by reason of an 1831 constitutional provision of the State of Delaware, disqualifying Negroes as electors, hence as jurors. The Delaware court in which, pursuant to the removal practice then in force, Neal filed his removal petition[132] took the view that the 1831 provision had been rendered void by the supervention of the Fourteenth and Fifteenth Amendments, so that, if there was any jury discrimination in Delaware—which, in any event, the Delaware court found that Neal had failed to prove—such discrimination was unauthorized by state constitution or statute. On writ of error to the Delaware court, the Su-

[131] 103 U. S. 370 (1881).

[132] Prior to 1948, removal procedure differed under the various federal removal statutes. In a civil rights case, the petition for removal was filed in the state court in which the case originated. See Rev. Stat. §641 (1875), continued by Judicial Code of 1911, §31, 36 Stat. 1096. If the state court declined to allow the removal, exception to that ruling could be preserved for examination by the Supreme Court of the United States on review of the final state court judgment, as in *Neal*. Alternatively, petition could be made to the federal trial court to which removal had been sought and disallowed by the state court, and that court might effect the removal by issuance of process which terminated the state proceeding, as in *Rives*. See the description of similar procedures in *Metropolitan Cas. Ins. Co.* v. *Stevens*, 312 U. S. 563 (1941).

The 1948 Code revision made removal practice uniform; under the uniform procedure, the petition for removal is filed in the first instance in the federal district court to which removal is sought, and this filing (with appropriate service on the state court and opposing party) effects removal, ousting the state court of jurisdiction unless and until the federal court remands. 28 U. S. C. §§1446-47 (1964).

preme Court disagreed that Neal had failed to show systematic exclusion of Negroes from the grand jury, and it reversed Neal's conviction for error in overruling his motion to quash the indictment and jury panels. But the Supreme Court agreed with the court below that this discrimination was unauthorized by statute and, in extended dictum, sustained denial of the removal petition. As the Court read *Strauder* and *Rives*, those cases held

> that the constitutional amendment was broader than the provisions of sect. 641 [present subsection 1443(1)] . . . ; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges, or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which sect. 641 refers, is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State,

excluded colored citizens from juries because of their race. (103 U. S. at 386-87.)

"The essential question, therefore," said the Court, was whether Negroes were excluded from Delaware juries "by reason of the Constitution and laws of Delaware"; [133] and, finding that "the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from her Constitution and laws," [134] the Court ruled removal unauthorized.

This ruling was repeated in a series of substantially identical cases at the end of the nineteenth century. In each case the defendant was a Negro charged with murder in a state court who based his removal petition upon allegations of systematic exclusion of Negroes from the grand and petit juries. In *Gibson* v. *Mississippi*, 162 U. S. 565 (1896); *Smith* v. *Mississippi*, 162 U. S. 592 (1896); and *Murray* v. *Louisiana*, 163 U. S. 101 (1896), it was alleged that this exclusion was practiced by local officials without authority of statute or state constitution. Smith and Murray moved to quash the indictment, petitioned the state court for removal, and challenged the venire or panel of trial jurors, all on the same equal protection grounds. Gibson did not move to quash the indictment but did petition for removal and challenged the petit jury. In all three cases, this Court affirmed the convictions, sustaining the denial of the removal petitions on the ground that no state statute or constitution denied the defendants their equal civil rights, and sustaining denial of the respective motions to quash or

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[133] *Id.* at 387.

[134] *Id.* at 389.

challenges to the petit jury on the ground that no sufficient case of discrimination was established. The *Gibson* and *Murray* opinions repeated substantially the passage from *Neal* quoted above, and *Smith* relied on *Gibson*.

In *Bush* v. *Kentucky*, 107 U. S. 110 (1883), the exclusion of Negro jurors was allegedly practiced under an 1873 Kentucky statute making only whites competent to serve as grand and petit jurors. Motions to quash the indictment, petitions for removal, and a challenge to the panel of petit jurors (the last being formally inadequate to raise a federal claim) were made and overruled. On review, this Court found that prior to Bush's indictment and trial the Kentucky Court of Appeals had declared the 1873 statute unconstitutional and void; the ruling put Bush in a posture identical to Neal's in Delaware, and the Court sustained denial of the removal petition on authority of *Neal*. As in *Neal*, the Court found the claim of grand jury discrimination supported on the record and reversed the conviction for error in denying the motion to quash.

In *Williams* v. *Mississippi*, 170 U. S. 213 (1898), defendant claimed not merely that administrative officials had systematically excluded Negroes from juries, but also that the provisions of the Mississippi constitution and statute prescribing the procedures for qualifying electors and jurors (only electors being competent jurors) were

> but a scheme on the part of the framers of that constitution to abridge the suffrage of the colored electors in the State of Mississippi on account of the previous condition of servitude by granting a discretion to the said officers as mentioned in the several sections of the constitution of the State and the statute of the

> State adopted under the said constitution, the use of said [*sic*: which] discretion can be and has been used in the said . . . County to the end complained of. (*Id.* at 214.)

It was alleged that the constitution was drawn by a constitutional convention of 133 white and one Negro members, which refused to submit the new constitution to popular vote for adoption, because of the heavy preponderance of Negro voters qualified under prior law; and that the legislature acted immediately under the new constitution, with a purpose to discriminate against Negroes in the franchise, by passing a statute which gave local election managers wide discretion in judging the qualifications of persons registering to vote. Motions to quash the indictment and for removal were made and denied. Williams was convicted; the Mississippi Supreme Court and the Supreme Court of the United States affirmed. Sustaining denial of the motion for removal, the Court began by quoting from *Gibson* the standard paragraph from *Neal*. It noted that no claim was made that the Mississippi constitution or statute was discriminatory on its face; and it concluded that the well-pleaded factual averments of the defendant's motions failed to present "sufficient allegation of an evil and discriminating administration" of the State's laws. 170 U. S. at 222. On these grounds, the motion to quash, as well as that for removal, was held correctly denied.

Obviously, as a technical matter, none of the cases after *Rives* held or could hold anything on the question of construction of the removal statute. Each case came to this Court on review of state court judgments of conviction (see note 132 *supra*); in each, the same jury-exclusion claim

which was the basis for a removal petition was, on an identical record, the basis for a motion to quash or other attack on the grand or petit jury; where (as in all cases save *Bush* and *Neal*) this Court affirmed, it necessarily rejected the jury-exclusion claim on substantive grounds and therefore made it unnecessary to decide whether a valid claim of this sort would sustain removal; and where (as in *Bush* and *Neal*) this Court reversed on grounds that the substantive claim supported a motion to quash, rejection of the removal claim was equally unnecessary to decision. *Rives* itself—the only responsible holding on the issue of removal—was, of course, ambiguous. Notwithstanding this, by 1898 the Court clearly supposed it had long since settled that removal under present §1443(1) was allowable only on a claim of facial unconstitutionality of a state statute or constitutional provision.

In *Kentucky* v. *Powers*, 201 U. S. 1 (1906), the Court handed down its last decision discussing the removal section.[135] Following three trials for murder in a Kentucky court, each resulting in conviction reversed on appeal by the Kentucky Court of Appeals, Powers, prior to his fourth trial, filed his petition alleging (1) that the killing with which he was charged had occurred during the course of a

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[135] Between 1887 and 1964 it was generally supposed that orders of a lower federal court remanding to a state court proceedings sought to be removed from it were not reviewable by the federal appellate courts. See Act of March 3, 1887, ch. 373, §2, 24 Stat. 553, as amended, Act of Aug. 13, 1888, ch. 866, 25 Stat. 435. Preservation of a removal point through state appeals following adverse final judgment, was generally bootless, for the reason that it added nothing to other federal claims so preserved. When the lower courts began to deny civil rights removal generally on the authority of *Powers* and its immediate predecessors, there was therefore no occasion for Supreme Court consideration of the issues decided below.

factional dispute, accompanied by widespread political excitement and animosity, involving contested elections for all of the major state offices; (2) that Powers had been the Republican candidate for secretary of state; one Taylor the Republican candidate for governor; and Goebel, the man with whose murder Powers was charged, the Democratic candidate for governor; (3) that Goebel's killing aroused intense hostility toward Powers on the part of Goebel Democrats and inflamed them against him; and that this hostility continued throughout his three trials and still existed; (4) that in each of Powers' three trials the sheriff and deputies charged with jury selection, all being Goebel Democrats, connived with the trial judge to violate the regular state procedures for selecting juries, and instead systematically excluded Republicans and Independents from the jury panels and selected Goebel Democrats for the purpose of assuring Powers' conviction; (5) that the judge at each trial denied Powers' requests that the jury be selected equally from both political parties (approximating the roughly equal popular vote each had polled at the last election), or that the jury be selected without reference to party, and overruled Powers' objections to jurors selected by systematic exclusion of Republicans and Independents; (6) that on each appeal, by force of a Kentucky statute which made certain trial court rulings unreviewable, the Kentucky Court of Appeals had held it had no power to upset the trial judge's rulings on the jurors—which decisions were the law of the case and as binding on the Kentucky courts as statutes; (7) that at each trial, Powers had pleaded in bar a pardon issued to him by Governor Taylor, who at the time of its issuance was the duly elected and acting governor of the State; that the trial judge had refused to admit the pardon as a defense (this being the

first time in Kentucky jurisprudence that a Kentucky court refused to give effect to an executive pardon); and on each appeal the court of appeals had sustained this ruling—which decisions also were the law of the case and binding on the Kentucky courts; (8) that Powers was confined in jail without bail awaiting a fourth trial and for all the foregoing reasons was unable to obtain a fair trial in the Kentucky courts.[136] The lower federal court assumed jurisdiction on removal, concluding

> that the prior action of the Scott Circuit Court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein—just as real as an unconstitutional statute would be—and that the defendant is denied the equal protection of the laws in said court, within the meaning of said section, and entitled to a removal on account thereof.[137]

On the State's appeal and petition for mandamus, this Court held that such a ruling was error, that removal was improper, and it ordered the case remanded to the state court. The Court noted that, notwithstanding the state court of appeals would not entertain Powers' claims of denial of his federal rights, review of those claims could be had by writ of error issued from this Court to the

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[136] Although this fact is not mentioned in the Supreme Court's opinion, it appears that each of the previous reversals of Powers' convictions by the Court of Appeals of Kentucky had been by 4–3 vote of that court; that, following the third reversal one judge who had on each occasion voted to reverse retired from the bench, and was succeeded by the judge who had presided at each of Powers' first two trials. See *Kentucky* v. *Powers*, 139 Fed. 452, 458-59 (C. C. E. D. Ky. 1905), rev'd 201 U. S. 1 (1906).

[137] 139 Fed. at 487.

state trial court after conviction. And as the Court read its earlier cases, those cases

> expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had.[138]

For almost sixty years after *Powers*, the lower federal courts consistently held that unless a state constitutional or statutory provision unconstitutional on its face was alleged to deprive a defendant of his federal rights, removal under present section 1443(1) was unauthorized.[139]

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[138] 201 U. S. at 31.

[139] *Hull* v. *Jackson County Circuit Court*, 138 F. 2d 820 (6th Cir. 1943) (alternative ground) (prejudiced judge in state post-conviction proceeding, *semble*); *Maryland* v. *Kurek*, 233 F. Supp. 431 (D. Md. 1964) (denial of speedy trial); *North Carolina* v. *Alston*, 227 F. Supp. 887 (M. D. N. C. 1964) (trespass charges unconstitutional under equal protection clause as applied to sit-ins; state supreme court has previously rejected this claim); *City of Clarksdale* v. *Gertge*, 237 F. Supp. 213 (N. D. Miss. 1964) (prosecution of civil rights worker for taking photographs in city hall without mayor's permission is designed to harass voter registration; hostile and racially discriminatory state courts; Negro exclusion from juries and from electorate electing state judges); *In re Kaminetsky*, 234 F. Supp. 991 (E. D. N. Y. 1964) (state contempt

**The decision below, in the exercise of the appellate jurisdiction given by the Civil Rights Act of 1964, was the first to distinguish *Powers* and to authorize removal in the absence of a facially unconstitutional state statute.[140]**

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proceeding will compel self-incriminating testimony); *Arkansas* v. *Howard*, 218 F. Supp. 626 (E. D. Ark. 1963) (hostile and racially prejudiced prosecutor and community; discriminatory prosecution; Negro jury exclusion; offense charged for conduct protected by federal court order); *City of Birmingham* v. *Croskey*, 217 F. Supp. 947 (N. D. Ala. 1963) (state policy of racial discrimination; Negro exclusion from juries and electorate electing state judges; jury hostility; charges void for vagueness and unconstitutional as applied apparently on first amendment and equal protection grounds); *Van Newkirk* v. *District Attorney*, 213 F. Supp. 61 (E. D. N. Y. 1963) (trial delay and pretrial hospital commitment without hearing); *Petition of Hagewood*, 200 F. Supp. 140 (E. D Mich. 1961) (prejudiced jury and trial judge; discriminatory enforcement of recidivist statute; various procedural errors); *Rand* v. *Arkansas*, 191 F. Supp. 20 (W. D. Ark. 1961) (prejudiced jury); *Hill* v. *Pennsylvania*, 183 F. Supp. 126 (W. D. Pa. 1960) (alternative ground) (denial of speedy trial); *Louisiana* v. *Murphy*, 173 F. Supp. 782 (W. D. La. 1959) (charge under licensing statute discriminatorily administered); *Texas* v. *Dorris*, 165 F. Supp. 738 (S. D. Tex. 1958) (prosecutor, judge, and jury controlled by complainant); *California* v. *Lamson*, 12 F. Supp. 813 (N. D. Cal.), *petition for leave to appeal denied*, 80 F. 2d 388 (Wilbur, Circuit Judge, 1935) (prejudiced jury); *New Jersey* v. *Weinberger*, 38 F. 2d 298 (D. N. J. 1930) (prejudiced trial judge). And see *California* v. *Chue Fan*, 42 Fed. 865 (C. C. N. D. Cal. 1890), and *Ex parte Wells*, 29 Fed. Cas. 633 (No. 17368) (Bradley, Circuit Justice, 1878), anticipating *Powers*.

Even claims that the statute under which the defendant was charged was facially unconstitutional were held insufficient to support removal in *Snypp* v. *Ohio*, 70 F. 2d 535 (6th Cir. 1934) (alternative ground) (Blue Sky law), and *North Carolina* v. *Jackson*, 135 F. Supp. 682 (M. D. N. C. 1955) (statute requiring racial segregation on buses), on the ground that it was not shown that the state courts would not fairly entertain the federal claim.

[140] The decision below has been followed in this regard by *Robinson* v. *Florida*, 345 F. 2d 133 (5th Cir. 1965); *Peacock* v. *City of Greenwood*, 347 F. 2d 679 (5th Cir. 1965); *Cox* v. *Louisiana*, 348 F. 2d 750 (5th Cir. 1965); *Wechsler* v. *County of Gadsden*, 351 F. 2d 311 (5th Cir. 1965); *McNair* v. *City of Drew*, 351 F. 2d

**B. The Construction of 28 U. S. C. §1443**

28 U. S. C. §1443 (1964) provides:

> §1443. *Civil Rights Cases.*
>
> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

In their petition for removal, defendants invoked both subsections of the statute, asserting that they were denied and could not enforce in the Georgia courts certain federal rights (R. 4), and that they were being prosecuted for acts under color of authority of federal law providing for those rights (*ibid.*). The rights referred to did not include those

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498 (5th Cir. 1965); *Galloway* v. *City of Columbus*, 5th Cir., No. 22935, decided November 24, 1965; *Cooper* v. *Alabama*, 5th Cir., No. 22424, decided December 6, 1965; and, e.g., *Alabama* v. *Boynton*, S. D. Ala., C. A. No. 3560-65, decided April 16, 1965; *In re Wright*, M. D. Ala., Cr. No. 11739N, decided August 3, 1965; *McMeans* v. *Mayor's Court of Fort Deposit*, M. D. Ala., Cr. No. 11759N, decided September 30, 1965; *Hughley* v. *City of Opelika*, M. D. Ala., Cr. No. 2319E, decided Nov. 19, 1965.

given by the public accommodations title of the Civil Rights Act of 1964, which had not been passed at the time of filing of the petition. Nevertheless, by virtue of this Court's decision in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), the court of appeals read the petition in light of the supervening rights given by that title; it held that the petition sufficiently alleged that the trespass prosecutions sought to be removed were based upon defendants' failure to leave covered establishments whose owners refused them service solely on account of race; it concluded that the maintenance of such prosecutions denied defendants' rights, and made them unable to enforce rights, provided by sections 201 and 203 of the act; and it therefore sustained removal under §1443(1), without reaching any question of the application of §1443(2). Georgia has not challenged here the propriety of the court of appeals' invoking the public accommodations provisions of the 1964 act, if the factual allegations of the petition adequately bring defendants within the protection of those sections.[141] Nor does it contend that the public accommodations title of the Civil Rights Act of 1964 is not a "law providing for equal rights" within §1443(2), or that the rights given by sections 201 and 203 are not rights "under any law providing for the equal civil rights of citizens . . . or of all persons" within §1443(1). These issues seem hardly questionable.[142] Georgia does contend, however, that, consistently

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[141] Georgia does contend that the allegations are inadequate. This contention is addressed in Part III of this brief, *infra*.

[142] The court of appeals was plainly right in testing the sufficiency of the petition in light of the public accommodations title of the Civil Rights Act of 1964. If the petition's factual allegations brought defendants within the protection of that title as construed in *Hamm*, no reason appears for denying them its benefit. Surely, after the supervening statute, the court of appeals might

with *Rives* and *Powers*, the defendants cannot be said to be denied or unable to enforce their rights (§1443(1)) unless the statute under which they are charged is uncon-

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have remanded the case to permit amendment of the petition, cf. *Maryland* v. *Soper* (No. 1), 270 U. S. 9, 36 (1926); but this would have been a wasted and profitless procedure. Under the notice-pleading provisions of 28 U. S. C. §1446(a) (1964), see Part III *infra*, a petition filed after the passage of the public accommodations title and "containing a short and plain statement of the facts which entitle [the petitioners] . . . to removal" under the title would not be deficient for lack of a statutory citation; and the same petition cannot be the less sufficient because filed before the title was enacted.

The court of appeals was also plainly right in holding that the public accommodations title of the Civil Rights Act of 1964 is a "law providing for the equal civil rights of citizens . . . or of all persons," within §1443(1), and a "law providing for equal rights" within §1443(2). (The two phrases have the same meaning. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 864 n. 270 (1965).) The construction of the quoted language is at issue in several cases now pending in this Court, e.g., *City of Chester* v. *Anderson*, 347 F. 2d 823 (3d Cir. 1965), petition for certiorari filed as O. T. 1965, No. 443, and in numerous others now in the lower federal courts; but neither those authorities which have given it a narrow compass nor those who view it more liberally have supported any meaning which would not include the Civil Rights Act of 1964. Compare *New York* v. *Galamison*, 342 F. 2d 255, 268 (1965), with Amsterdam, *supra*, at 869. Since the act's inclusion is clear and is not challenged by Georgia in this case, further discussion here seems unnecessary. Defendants' counsel, however—being counsel in a number of cases in the lower courts as well as in the *Anderson* case, *supra*—hope this Court will not think it amiss for them respectfully to suggest that the Court's opinion here can avoid any risk of improper inference possibly affecting those cases if the opinion makes it clear that no issue is contested in the present case requiring decision of the question what federal laws are laws "providing for . . . equal rights" within §1443. The number of cases in the courts below, and the eagerness of those courts for enlightenment with respect to the several unsettled issues of construction of the civil rights removal statute makes it particularly likely that any opinion of this Court discussing §1443 will be taken to shed light on those issues far beyond its intendment.

stitutional on its face—or unless, at least, it is alleged that the Georgia courts will not fairly enforce those rights. And it asserts that defendants' act in the exercise of rights given by the public accommodations title are not thereby "under color of authority derived from" that title (§1443(2)). Both contentions are untenable.

1. ***The Court of Appeals Correctly Held That Persons Prosecuted for Exercising Their Right to Equal Public Accommodations Under the Civil Rights Act of 1964 Are Thereby Denied and Unable to Enforce Those Rights, Within the Meaning of §1443(1), Notwithstanding the Statutes Underlying the Prosecutions Are Not Unconstitutional on Their Face and the State Courts Are Not Alleged to Be Unfair.***

Georgia argues that this Court's decisions from *Virginia* v. *Rives* to *Kentucky* v. *Powers* disallow removal under present §1443(1) unless a criminal defendant seeking to remove can point to some state statutory or constitutional provision, applicable to his prosecution in the state courts, which is unconstitutional on its face (Br. 30, 31-34, 42-43, 46). These decisions, the State urges, have limited the denials of and the inabilities to enforce federal rights, of which the statute speaks, to denials and inabilities by reason of facially unconstitutional state legislation. Any inquiry concerning application of the *Rives-Powers* doctrine to this case must begin with inquiry into the nature and provenience of that doctrine.

Nothing in the language of §1443(1) as it now is or ever was written supports the limitation of its operation to instances of state legislation which on its face denies federal rights. Indeed, the wording of the original 1866 enactment strongly suggests that no such limitation was intended, see pp. 64-65 *supra*, and the pertinent legislative

history is plain as a pikestaff against the limitation, see pp. 56-66 *supra*. Experience has not suggested that statutory denials of federal civil rights are more numerous or more grievous than non-statutory denials; to the contrary, as Senator Dodd recently put it, "by far the most serious denials of equal rights occur as a result not of statutes which deny equal rights upon their face, but as a result of unconstitutional and invidiously discriminatory administration of such statutes." 110 Cong. Rec. 6955 (April 6, 1964). The obvious justification for congressional creation of a federal *trial* jurisdiction on removal is not that facially unconstitutional state statutes may be so declared. Such statutes, bearing their defect in the written word, have been and can always be readily disarmed by this Court on direct review of the final judgments of the state courts.[143] *Removal* is needed and justified to ward against impingements on federal rights which are less obvious,

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[143] This Court's jurisdiction on direct review was mandatory in such cases under the First Judiciary Act, of 1789, and continued so under the 1867 amendatory act. Act of Feb. 5, 1867, ch. 28, §2, 14 Stat. 386. Since the Act of Sept. 6, 1916, ch. 448, §2, 39 Stat. 726, the Court has mandatory jurisdiction by appeal to review the judgment of the highest court of a State in which decision can be had in any case in which that court sustains a state statute against federal constitutional challenge, 28 U. S. C. §1257(2) (1964); the Court's jurisdiction to review cases in which a state court has rejected a federal constitutional claim not involving challenge to a state statute is limited to certiorari, 28 U. S. C. §1257(3) (1964). Under this pattern, there is all the more reason why a state criminal defendant who demonstrates that there exists a non-statutory bar to effective enforcement of his federal rights in the state courts should be permitted removal; unlike the defendant whose claim of deprivation of federal rights is directed against a state statute, he has no review as of right by this Court if he remains in the state system. (The workings of the Court's appeal and certiorari jurisdiction, dating from 1916, were given significant consideration in *Fay* v. *Noia*, 372 U. S. 391, 412-13 (1963), in applying 1867 habeas corpus legislation.)

more immune against appellate correction, as where state court hostility to a federal claim, or bias against its claimant, warp the process by which the facts underlying the claim are found. This is the case where local prejudice, local resistance, pitch the risk of error, always incident in fact finding,[144] strongly against federal contentions; it was to meet such situations that Congress had utilized removal prior to 1866[145] and utilized it in civil rights cases in and after that year.[146]

The construction put on the removal statute by the *Rives-Powers* line of cases, therefore, has no very evident credentials of history or reason. Nor are its credentials of authority much better. Beginning as an ambiguous observation in *Rives* (see pp. 75-76 *supra*), translated into rigid doctrine by a series of opinions which neither needed to discuss the question nor undertook to cast much illumination on it (see pp. 77-82 *supra*), and finally treated in *Powers* as long settled (see pp. 82-85 *supra*), the doctrine lacks the support of any single, decisive exposition by this Court. The Court's only attempts to explain it, in *Rives* and *Neal* v. *Delaware*, have consisted of the reasoning that (a) Congress, in authorizing removal before trial on a showing of denial or inability to enforce federal civil rights, must have meant by those terms some sort of denial or inability which could ordinarily be shown before trial; that (b) prior to state trial, a removal petitioner cannot ordinarily show that he will be denied or unable to enforce

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[144] See *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963); *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 416-417 (1964).

[145] See pp. 39-44, *supra*.

[146] See pp. 44-68, 70-72, *supra*.

his federal civil rights in the state courts, unless those rights are explicitly repudiated by state legislation; *therefore* that (c) the denial or inability intended was a denial or inability occasioned by facially unconstitutional state legislation. Both premises of the syllogism are manifestly defective. The first ignores the circumstance that the statutory language "are denied or cannot enforce" derives from the 1866 act, which permitted removal both before and after state trial.[147] Omission of the post-trial removal provision in the 1875 Revised Statutes may have made the necessary showing of denial or inability more difficult by precipitating the time when denial or inability had to be shown, but it hardly provides a basis for inference as to what constitutes denial or inability. The second premise —that, absent legislation, it cannot be known what a state court will do—simply confounds the common law tradition and daily legal experience. *Strauder* had authorized removal on less than absolute certitude that federal civil rights would be denied—that is, notwithstanding the possibility that the West Virginia judges, obedient to the supremacy clause, would void unconstitutional state legislation. Surely the same degree of certitude is attainable in situations where no facially unconstitutional state legislation is involved.

If the *Rives-Powers* doctrine is explicable, it is so only as the resolution of an intensely practical difficulty. Whatever the original form of the removal statute, the statute as it came before the Court in *Rives* and later cases permitted removal exclusively before state trial. The difficulty lay in determining how a removal petitioner's denial of or

[147] See note 124 *supra*.

inability to enforce his federal civil rights could be litigated at this stage. Several alternatives were open to the Court. It might have said that the state courts would always be presumed responsive to their Supremacy Clause obligations, hence that no state defendant was denied his federal rights so long as those courts might entertain his claim for their vindication. This approach would read *Strauder* and the removal statute together off the books. It might have said that the federal district court to which removal was sought should take evidence on the issue of the actual probability that the state judges would disobey the supremacy clause—the probability, that is, that they would not fairly entertain defendant's federal claims. This approach would usually require an extended evidentiary hearing in the federal court on a complicated and speculative factual question—itself an undesirable practice for resolving a preliminary question of jurisdiction—and, in addition would plunge the federal judges into an embarrassing and politically unfeasible trial of the constitutional fidelity of their state counterparts. Or the Court might have said that a state litigation was removable whenever a federal civil rights issue could possibly arise in it and whenever the state judges could possibly resolve it wrongly against the defendant. This would have made the federal removal jurisdiction virtually coextensive with the state criminal process, and carried off many civil cases as well.

Faced with the various unpalatable alternatives, the Court seems to have hit upon an unsatisfactory but necessary compromise: removal was to be allowed whenever state courts would *probably* deny a federal civil right; but the sole acceptable—and at the same time wholly sufficient—showing of such probability was the existence of a facially

unconstitutional state statute. Protracted preliminary litigation of the jurisdictional question was thus avoided; trial of state judges by federal judges eschewed; some little piece of the civil rights removal statute preserved.

Defendants need not in this case ask reconsideration of the *Rives-Powers* compromise. For the compromise struck in those cases was struck with respect to a very different sort of federal civil right than they claim here. With monotonous sameness the cases from *Rives* to *Powers* are concerned with a single substantial federal right: the right against systematic discrimination in jury selection. That is a federal procedural guarantee, a right or immunity against a particular form of state judicial proceeding. By contrast, defendants here claim denial of a federal *substantive* right or immunity, an insulation against the underlying state criminal charge which is the basis of the prosecution. The difference between this case and *Rives-Powers* is critical for several reasons. Those reasons, we submit, compel the conclusion that defendants prosecuted for the exercise of the rights to equal public accommodations granted by the Civil Rights Act of 1964 may remove the prosecutions to a Federal District Court whether the statute under which they are charged violates those rights on its face or as applied.

*First,* the sort of procedural right involved in *Rives-Powers* is essentially a guarantee against *conviction* in a proceeding in which certain federally required procedures are not followed. The sort of substantive right involved here is a guarantee against *prosecution.* Section 201 of the Civil Rights Act of 1964 gives the defendants a right to equal service in places of public accommodation. Section 203 gives them a right against intimidation or coercion, punishment or any "attempt to punish" them in respect of

their exercise of rights under section 201. It is these rights which they claim they are denied and cannot enforce by reason of the pending state prosecution against them. These rights—unlike the *Rives-Powers* right against conviction without constitutional process—may be denied or rendered unenforcible by the very fact of prosecution, anterior to and irrespective of conviction. As the Fifth Circuit has said in a related context, under the Civil Rights Act of 1964 the defendants "simply may not be punished and prosecution is punishment." *Dilworth* v. *Riner*, 343 F. 2d 226, 231 (5th Cir. 1965).

The truth of the observation that prosecution for a federally protected act is punishment for that act should be obvious. Persons under prosecution are restrained of their liberty pending trial and appeal, or in the alternative compelled to post financial security for their appearance. If professional bonds are not available or availed of, their property or that of their friends and relatives is encumbered; if available and availed of, a defendant pays successive fines—in the form of irrecoverable bond premiums—as the cost of proceeding court by court until his federal claim is recognized. The defendant's time and money—if he has it—and those of his lawyers are eaten up by his defense. In the course of the proceeding, he is exposed to further risks of penalty by hostile courts: contempt proceedings for procedural defaults; perjury prosecutions whose success depends on trials of credibility. His misstep or his lawyer's in their progress through the criminal proceeding may default or forfeit his substantively valid federal claim; or that claim, valid in fact, may be destroyed by unsympathetic but unreviewable adverse fact-finding by the state courts. In any event, as unresolved criminal

charges hang over his head for years,[148] his mobility, acceptability at educational and other institutions (including the national armed services), eligibility for various state-conferred benefits, and willingness to risk the further displeasure of the state authorities are clogged.[149]

*Second,* as this last consideration makes evident, much more is involved in a prosecution aimed at conduct protected by substantive federal guarantees than the punishment of an individual defendant for a single past act or occurrence. The design and inevitable consequence of such a prosecution is to deter the defendant and all others like him from engaging in the sort of conduct with which he is charged—to "intimidate . . . or coerce" them, in the words of section 203 of the Civil Rights Act of 1964, from engaging in the conduct which it is the purpose of federal law to protect. In numerous contexts involving federal guarantees of personal freedoms, this Court has recognized that "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433 (1963); see *Smith* v. *California,* 361 U. S. 147, 151 (1959); *Cramp* v.

[148] In February and March, 1964, the Supreme Court of Mississippi reached, and affirmed, convictions in harassment prosecutions arising out of the May, 1961 Freedom Rides. See *Thomas* v. *State,* 160 So. 2d 657 (Miss. 1964); *Farmer* v. *State,* 161 So. 2d 159 (Miss. 1964), and companion cases; *Knight* v. *State,* 161 So. 2d 521 (Miss. 1964). And more than another year was to pass before the Supreme Court of the United States reached, and reversed, these convictions. *Thomas* v. *Mississippi,* 380 U. S. 524 (1965). Compare *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) (two years from arrest to Supreme Court reversal of conviction); *Fields* v. *South Carolina,* 375 U. S. 44 (1963) (three and a half years from arrest to Supreme Court reversal of conviction); *Henry* v. *Rock Hill,* 376 U. S. 776 (1964) (more than four years from arrest to Supreme Court reversal of conviction).

[149] See Amsterdam, note 142 *supra,* at 796-799.

*Board of Public Instruction*, 368 U. S. 278, 286-288 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66-70 (1963); *Baggett* v. *Bullitt*, 377 U. S. 360, 378-379 (1964). Indeed, a cardinal objective of the criminal law is just this sort of general deterrence. Particularly during the pendency of a prosecution, the assertion of state prohibitive power which it embodies and advertises overhangs, threatens and represses conduct of the kind prosecuted. Federal protection of the conduct, if it is to be meaningful, must include protection against this repression. "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).[150]

Congress, by the Civil Rights Act of 1964, has given Negroes the right to equal service in restaurants, the right to sit and eat in Leb's and in the Ship Ahoy of Atlanta. It has given them the right to enter, sit and eat without fear of prosecution or intimidation. It is these rights, not the right to have a trespass conviction reversed by the Supreme Court of Georgia or the Supreme Court of the United States long after they have been excluded from Leb's and from the Ship Ahoy which the present prosecutions threaten. It is these rights—unlike the rights of criminal procedure involved in the *Rives-Powers* decisions—which must be vindicated immediately, vindicated

[150] The cases cited in text all involve First Amendment freedoms which, as this Court has recognized, are freedoms of particular vulnerability and significance requiring extraordinary protection against repression. But Congress in the Civil Rights Act of 1964 has made the judgment that the rights to equal public accommodations protected by that act are similarly vulnerable and significant; hence, section 203 of the act, casting about them a broad range of insulation.

by entire insulation from the state criminal process, if they are to be vindicated at all. It is these rights, then, within the meaning of 28 U. S. C. §1443(1) which the defendants are denied and unable to enforce so long as the present prosecution persist unabated.

*Third,* where, as here, the federal rights claimed by state criminal defendants go to the very roots of their prosecution, not merely to its form, the State's interest in retaining the prosection within its own courts is inconsiderable. If this sort of federal right is to be made meaningful, the State must eventually relinquish or be deprived of the power to *begin* criminal proceedings which repress it. The *Rives-Powers* doctrine responds to concern with federal-state relations by refusing to deprive the state courts of competence over federal issues, even though they may decide those issues wrongly. To accept this response and to run the risk of error with respect to one sort of federal claim does not compel the same response, the same willingness to run the risk with respect to others. Federal substantive civil rights, federal immunities of personal liberty against prosection, can tenably be claimed in far fewer cases than federal procedural rights. Their removal therefore involves considerably smaller intrusion of federal power into the state criminal process. It involves no intrusion in matters of state judicial procedure itself, leaves the federal law regulating such procedure in the hands of the state courts in the first instance. That is consistent with the judgment made in *Rives* and *Powers* that the primary responsibility of the state courts for such matters of their own procedure is best left to them. The cases taken from their competence are only those which federal law has decreed should not be in court at all. And

these cases are, precisely, the cases in which the risk of state court error is most destructive of federal rights, because that risk not only jeopardizes the rights of the individual before the court but also—when taken into account by those who think of venturing to exercise their rights—serves as a substantial repressing force. It makes little difference to the state criminal defendant that his claim of Negro exclusion from the grand or petit jury is rejected by the trial judge, so long as it is accepted by this Court or by a post-conviction habeas corpus court. It makes a great deal of difference to the Negro deciding whether to enter Leb's in Atlanta whether he is hauled on trespass charges before the Superior Court of Fulton County or the United States District Court.

*Fourth*, the very arguments put forth in the *Rives-Powers* decisions to distinguish *Strauder* v. *West Virginia*, *supra*, point to the conclusion that a proper case for removal is stated by a defendant who asserts that the statute under which he is prosecuted is unconstitutional as applied to his conduct,[151] although not unconstitutional on its face. *Strauder*, concerned with the sufficiency of a pretrial showing of denial of or inability to enforce federal civil rights, held the showing sufficient where a state statute required jury discrimination, although it was not shown that the state courts would obey the statute in preference to the Constitution. *Rives* and its successors held a showing insufficient "where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from

[151] The term "unconstitutional" as used in the text includes state statutes voided by the supremacy clause because in conflict with federal civil rights legislation.

juries because of their race." *Neal* v. *Delaware*, pp. 78-79, *supra*. The test of removability, then, based on the supposed degree of certitude with which it could be said before trial that the state courts would improperly reject a federal claim, was whether state statutory law directed the federally impermissible result complained of, so that that result was produced by statute and not simply by state judicial action unconstrained by the State's legislation. Under this test, it cannot matter whether the state statute involved is unconstitutional on its face (i.e., in all applications to a described class) or unconstitutional as applied (i.e., insofar as it condemns particular defendants' federally protected conduct). In both cases, equally, it is the statute which compels the state courts to the constitutionally unallowable result and thus brings it about that the defendant "cannot enforce in the courts of [the] . . . State" his federally protected rights. The critical characteristic of the *Rives-Powers* cases was not lack of a *facially* unconstitutional state statute, but lack of a statute which had anything to say about the constitutional denial whose future occurrence was the proffered basis for removal. The cases involved a matter of trial procedure unregulated by statute; in none of them did the defendant claim that the substantive criminal statute on which the prosecution was bottomed was invalid, either on its face or as applied, by reason of federal limitations on the kind of conduct which a State may punish. This latter sort of claim asserts that, under the Constitution, ***no matter what procedures may be forthcoming at trial,*** the State cannot constitutionally apply the statute relied on to the conduct with which the defendant is charged. *Neal* v. *Delaware* and subsequent cases explain the *Rives-Powers* line as holding that "since [the removal] . . . section only authorized a removal before trial, it did not

embrace a case in which a right is denied by judicial action during the trial . . . ." [152] But a defendant who attacks the underlying criminal statute as unconstitutional does not predicate his attack on "judicial action during the trial." He says that if he is convicted at all under the statute his conviction will be federally illegal. Nothing about his contention is contingent upon the nature of "judicial action, after the trial commenced . . . ." [153]

> When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of [present subsection 1443(1)]. . . . (*Virginia* v. *Rives*, 100 U. S. 313, 321 (1880).)

Since Georgia's prosecution of the defendants rests upon the theory that the Georgia trespass statute makes their conduct criminal, and since the Georgia trespass statute cannot make their conduct criminal consistently with the Civil Rights Act of 1964 and the supremacy clause under the

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[152] *Neal* v. *Delaware*, 103 U. S. 370, 386 (1881); see, e.g., *Gibson* v. *Mississippi*, 162 U. S. 565, 581 (1896).

[153] *Neal* v. *Delaware*, *supra* note 152 at 387. Of course, the state court *may* hold that the statute does not apply, or *may* hold it unconstitutional and enforce the defendant's federal claims. But it is always possible that a state court may do these things, and if the possibility precludes removal, the removal statute is read entirely off the books. This would require repudiation of Strauder, and rejection of the assumption on which the *Rives-Powers* line of cases was decided: that if an unconstitutional state statute were found, removal would be proper.

circumstances alleged in their removal petition,[184] Georgia's statute—whether or not unconstitutional in other applications—denies defendants' right within the meaning of *Rives* and §1443(1).

What has already been said is sufficient to answer Georgia's alternative argument (Br. 51-54) that removal under §1443(1) is unavailable unless the defendants demonstrate that the Georgia courts will not fairly entertain their federal claim. Acceptance of this argument would require overruling *Strauder* v. *West Virginia*. It would also require that a federal district judge, on petition for removal, try the constitutional fidelity of the state judiciary. This is inconceivable. The present case demonstrates the difficulty. If the district court below were required to try the Georgia courts, it could hardly stop with the *Bolton* opinion of the Georgia Supreme Court, described at pp. 52-54 of Georgia's brief. It would have to make a somewhat more searching inquiry to discover whether—whatever the attitude of the Supreme Court of Georgia—Judge Durwood T. Pye has acquiesced in this Court's *Hamm* decision. Compare this Court's decision in *Walker* v. *Georgia*, 381 U. S. 355 (1965), with Judge Pye's order on remand, set out at App. 4a-7a. It would have to evaluate Judge Pye's demonstrated attitude in other civil rights matters as a basis for prediction of his probable fairness in this case. See Galphin, *Judge Pye and the Hundred Sit-Ins*, 150 The New Republic 8 (No. 22, Issue 2584, May 30, 1964). It would have to similarly evaluate Judge Pye's attitude toward the present case, as evidenced by his orders and opinions set out in the Appendix to Brief for Respondents *Rachel et al., Georgia* v. *Tuttle*, 377 U. S. 987 (1964). Such an inquiry is palpably impossible.

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[184] See Part III *infra*.

**2. *Persons Prosecuted for Exercising Their Right to Equal Public Accommodations Under the Civil Rights Act of 1964 Are Thereby Prosecuted for an Act Under Color of Authority Derived From the Civil Rights Act, Within the Meaning of §1443(2).***

If this Court agrees with the construction of §1443(1) by the court of appeals, no question regarding §1443(2) need be reached. As an alternative ground for affirmance of that court's judgment, however, defendants submit that their petition for removal ought be held sufficient under the latter subsection. Their position, simply, is that a state criminal defendant charged with an offense for an act in the exercise of his right to equal public accommodations given by section 201 of the Civil Rights Act of 1964 is thereby prosecuted "For [an] . . . act under color of authority derived from" section 201, within the meaning of §1443(2). As Georgia notes (Br. 44-46), the Court of Appeals for the Fifth Circuit, which did not reach the issue in the present case, has since decided it adversely to defendants' contention, in part on the ground that §1443(1), construed as the Fifth Circuit construes it, "is an adequate vehicle for the protection and vindication of the rights of [removal petitioners] . . . ," *Peacock* v. *City of Greenwood*, 347 F. 2d 679, 686 (5th Cir. 1965). Should this Court reverse the Fifth Circuit's construction of §1443(1), ample scope must be given §1443(2) in order to realize the removal statute's protective purposes.

Georgia urges on the Court (Br. 44-46) the *Peacock* construction of §1443(2), which limits removal under that subsection to "federal officers and those assisting them or otherwise acting in an official or quasi-official capacity." 347 F. 2d at 686. "Color of authority" is thus read to mean "color of office." Georgia also relies (Br. 40-42) upon the

construction given §1443(2) by *New York* v. *Galamison*, 342 F. 2d 255 (2d Cir. 1965)—although the reliance is rendered more than a little precarious by the Second Circuit's explicit distinction of public accommodations cases like the present one, whose removability under §1443(2) the court leaves open. See 342 F. 2d at 265, 271.[155] The *Galamison* construction, in essence, holds that an act is done under color of authority derived from federal law providing for equal civil rights only if federal civil rights law *commands* that the act be done, as distinguished from commanding that the actor be left free to do it. Both *Peacock* and *Galamison*, however, take an inappropriately narrow view of §1443(2).

The subsection authorizes removal of prosecutions "For any act under color of authority derived from any law providing for equal [civil][156] rights." As a matter of language, this might cover (i) only federal officers enforcing laws providing for equal civil rights; or (ii) federal officers enforcing such laws and also private persons authorized by the officers to assist them in enforcement; or (iii) the preceding class and also all persons exercising privileges or immunities under such laws.[157] Construction (i) is shortly

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[155] The quotation from the *Galamison* opinion at Br. 40-41 is misleading in suggesting that the Second Circuit would have relegated removal petitioners who—like defendants here—invoked the Civil Rights Act of 1964 to the exclusive protection of §1443(1). The quoted passage does distinguish the showings needed for removal under subsections (1) and (2) respectively of §1443, but in other passages the court reserves the question whether petitioners like the present defendants are entitled to removal under subsection (2). See pages cited in text.

[156] See note 142 *supra*.

[157] Private persons not authorized by federal officers to enforce federal laws could not claim "color of authority derived from" such laws in any other manner than by exercising privileges or immunities given them by the laws.

disposed of: the Civil Rights Act of 1866 allowed removal of suits and prosecutions "against any officer, civil or military, *or other person,* for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from . . . " the act or the Freedmen's Bureau legislation;[158] this "officer . . . or other person" formula survived successive codifications[159] until 1948; all words limiting the nature or character of the petitioner were then dropped, the reviser's note disclaiming substantive change.[160]

Three technical considerations support rejection also of alternative construction (ii). First, the "color of authority" clause of the 1866 act applied to "persons" without explicit limitation to persons acting under federal officers. The same Congress which passed the act put such an explicit limitation in the "authority" clause of the revenue-officer removal statute of that year.[161] Second, the "color of authority" provision of 1866 was carried forward with the "denial" provision in section 641 of the *Revised Statutes.* Other removal provisions applying to federal officers and persons acting under them—including the provisions of the 1871 amendatory act to the Second Civil Rights Act—were carried forward in section 643. This is some evidence of a relatively contemporary understanding that, unlike the section 643 provisions, the "color of authority" clause of the civil rights removal section applies to persons who are neither federal officers nor acting under federal

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[158] The statute is set out in the text at pp. 55-56, *supra.*

[159] See Rev. Stat. §641 (1875); Judicial Code of 1911, ch. 231, §31, 36 Stat. 1096.

[160] See p. 70, *supra.*

[161] See p. 44, *supra.*

officers. Finally, evidence of a similar congressional understanding is seen in the continuation of the civil rights "color of authority" provision in subsection 1443(2) in 1948. The 1948 revision of Title 28 of the United States Code expanded the earlier revenue-officer removal statutes to cover in section 1442(a)(1) all suits or prosecutions against any federal "officer . . . or person acting under him, for any act under color of such office." If subsection 1443(2) reaches only federal officers and persons acting under them, it is wholly tautological in the 1948 Code.

This last consideration does not suggest attributing to the Code revision any purpose to change the meaning of the law. But in view of the ambiguities in language and history of prior law, the desirability of giving subsection 1443(2) some meaningful place in the context of present judiciary legislation does strongly support construction (iii). More important, construction (iii) is supported by the context of the Civil Rights Act of 1866.

Unlike the Habeas Corpus Suspension Act of 1863, on whose language the "color of authority" clause of 1866 was modeled,[162] the 1866 act granted extensive private privileges and immunities, including some whose exercise would foreseeably provoke state law charges of trespasses and wrongs. Section 1, for example, gave all citizens the equal right to acquire and hold real and personal property and to full and equal benefit of all laws for the security of persons and property. In the exercise of ordinary self-help measures to defend their property or resist arrest under the discriminatory Black Codes, freedmen asserting their equal rights under these sections would likely commit acts for which

[162] See p. 43, *supra*.

they might be civilly or criminally charged in the state courts.

The "color of authority" clause of the removal section, present subsection 1443(2), covers such cases in terms. By the clause Congress seems to have meant to authorize removal of cases of this sort without requiring the state defendant to demonstrate in addition that he was denied or could not enforce his equal civil rights in the state courts, within the meaning of the "denial" clause which is now subsection 1443(1). The reason why "denial" was not demanded in subsection (2) cases is apparent. While subsection (1) protects all federal civil rights, substantive and procedural, subsection (2) isolates and separately treats cases involving substantive federal claims. In such cases, as defendants have shown at pp. 95-103 *supra*, there was and is a particularly imperative need for immediate and noncontingent federal jurisdiction and for the confidence given by the assurance of such a jurisdiction, lest exercise of the federally guaranteed substantive rights be deterred by fear that those rights may later have to come to the test in an unsympathetic state court. Like the right of equal public accommodations given by the Civil Rights Act of 1964, the privileges given the freedmen in 1866 to have an equal enjoyment of property and to move about unconstrained by racially discriminatory regulations[163] would have been seriously impaired if the freedmen had thought that they could be haled before the state courts in the first

[163] One of the clear purposes of the 1866 act was to assure the freedmen the freedom of movement which they were denied the "pass" system of the Southern States. Senator Trumbull persistently recurred to the evils of the "pass" system, in debate on the civil rights bill, CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866), 1759 (April 4, 1866), and on the amendatory freedmen's bureau bill, *id.* at 941 (Feb. 20, 1866).

instance on charges of exercising those freedoms. Exercise of the freedoms must have been within congressional contemplation an act "under color of authority" of the Civil Rights Act.

This is to say that any act which is *protected* by a law providing for equal civil rights is an act done "under color of authority derived from" the law. Such a view rejects *Peacock's* equation of "authority" with "office" and leaves no room for the construction advanced in *Galamison* that federal civil rights law must "direct" the actor to act. Judge Friendly, writing for the majority in *Galamison*, concluded that, in order for a law to provide an actor "color of authority," that law must "direct" or "encourage" him to act. Assuming that a private individual not acting under a federal officer might sometimes be given "color of authority" by federal law, Judge Friendly insisted that this could be so only if such a private individual could "point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him." 342 F. 2d at 264. Judge Marshall (as he then was) disagreed with the majority's test of "color of authority." Dissenting, he stated his own test: "Any individual acts under 'color of authority' of a law at least when his conduct is protected by that law, when interferences with that activity are unlawful and the subject of civil or criminal legal remedies." 342 F. 2d at 276. He reasoned that the most familiar technique for encouraging certain private activity was to provide protection for that activity or to make interferences with the activity unlawful. *Ibid.* His position seems plainly correct.

To support its construction, the *Galamison* majority said that "color of authority" in subsection 1443(2) must have a narrower meaning that "a right under" in subsection 1443(1), "since otherwise, in almost all cases covered by the first clause . . . , the requirement of showing denial or inability to enforce would be avoided by resort to the second." 342 F. 2d at 264. But under any construction of "color of authority," subsection (2) has a narrower reach than subsection (1); the "act" requirement of subsection (2) limits that subsection to cases presenting *substantive* federal claims. The court's argument therefore has several weaknesses. First, its phrase "almost all cases" makes the extraordinarily implausible assumption that the incidence of colorable substantive federal civil rights claims far outstrips the incidence of colorable procedural claims. Second, subsection (2) appears to be designed precisely to avoid "the requirement of showing denial or inability to enforce" in the case of substantive claims—and for good and sufficient reason. Third, as Judge Marshall persuasively points out, the majority's insistence on a statutory directive wholly defeats its assumption that subsection 1443(2) may reach private, unofficial action. Id. at 277. No federal law providing for equal civil rights (however that phrase be construed) *directs* anyone other than a federal officer to do a protected act. Hence, the conclusion that §1442 reaches private individuals in any case compels a conception of "authority" within that subsection as "authorization," "license," "protection"—entirely natural meanings of the term. The majority also says that, because in the cases "at which §1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers"—the removal petitioner would have acted "on a specific statute or order telling him to act," a "private per-

son claiming the benefit of §1443(2) can stand no better . . ." 342 F. 2d at 264. Again Judge Marshall's response is compelling: "The manner in which a private person acts under the authority of a law need not be the same as that of an officer." *Id.* at 276. The law applies to each according to his nature; the assumption or conclusion that it applies to private individuals at all precludes the holding that it applies only when a private individual meets some condition which private individuals never meet.

The trouble with both the *Peacock* and *Galamison* readings of "color of authority" is that they largely render §1443(2) a dead letter. The subsection might indeed be relatively unimportant if ample scope were given §1443(1). But Georgia's position here nullifies that subsection as well and thereby relegates civil rights removal to the ash heap. Defendants submit this would be intolerable.

Instructed by bitter experience that the state courts could not and would not be the efficient organs for vindicating federally guaranteed civil rights—that, to the contrary, they could and would be instruments for the destruction by harassment of the previous liberties secured by battle and the post-Civil War amendments—the Reconstruction Congresses did no vain act in the creation of the federal civil rights removal jurisdiction. That jurisdiction responded, basically, to two critical concerns. First, the same Congresses which made a high national commitment to protect individual freedom and equality against the States knew that federal fact-finding forums were absolutely indispensable to the effective enforcement of those guarantees.[164]

[164] See *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963); cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964).

Second, those Congresses well understood that immediate, undelayed enforcement was imperative if the guarantees were to survive.[165] These concerns are equally compelling today. Federal guarantees of civil rights, turning as they ordinarily do upon contested issues of fact, will be of only academic value to the citizen unless the facts are found in a federal tribunal.[166] And delays of the sort customary to the heavy-handed state criminal process—delays of years, coupled with the onerous burdens and perilous vicissitudes of litigation in the state courts—threaten to annihilate the promised freedoms and convert eternal liberties into eternal lawsuits. Meanwhile, those persons who dare to exercise their rights are fettered with the clogs of pending prosecutions, while others—threatened with the same fate—forego even the attempt at freedom.

Repression of precious federal rights is no new or fleeting phenomenon. Repression is endemic to the popular, localized, politics-dominated state criminal administration. Today, as in Reconstruction times, those who control the state criminal process are "harassing, annoying and even driving out of the State" [167] persons to whose safe conduct the national faith is pledged. There are thousands of such harassment prosecutions in the South today. There are fewer outside the South, but not few. Today the defendants are Negroes. Thirty years ago they were Jehovah's Witnesses or labor union organizers. Sixty, Orientals on the

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[165] See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Freedman* v. *Maryland*, [illegible] U. S. 51 (1965); cf. *Monroe* v. *Pape*, 365 U. S. 167 (1961), *McNeese* v. *Board of Education*, 373 U. S. 668 (1963).

[166] See, e.g., *Fe[illegible]* v. [illegible] *ork*, 340 U. S. 315 (1951).

[167] Cong. Globe, 39th Cong., 1st Sess. 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

Coast. Before that, the Unionists, the Cherokees, the Freedmen—history has followed one such group with another. And if the past is prelude, the probability is strong that the popular organs of state prosecution will never effectively protect federal civil liberties: that they will remain, rather, weapons of harassment, not vindication, of persons who exercise the unpopular rights which the Constitution gives.

Yet, the right to live free of racial discrimination must be not merely the right to have one's state conviction for attempting to exercise that right eventually overturned by this Court on direct review or by a federal court exercising post-conviction habeas corpus jurisdiction. The right to equal public accommodations must be not merely the right to secure a favorable federal ruling some years later. If these rights are to be anything more than paper rights they must be exercisable free of state interference in the real world; and such interference must be stopped as soon as it begins. That is the basic justification of a federal civil rights removal jurisdiction. State harassment works, for the most part, not by final judgments of conviction but by mesne process. It can be stopped only by a federal anticipatory jurisdiction as broad as the evil itself. Although federal trial procedure guarantees may be vindicated at the conclusion of state process, the power of repression by mesne process allows no such accommodation in the case of substantive guarantees. When individuals are prosecuted for their exercise of federally guaranteed freedoms—when they are prosecuted, in the words of §1443(2), for acts under color of authority of federal civil rights law—then the respective interests of the Nation and the States can be reconciled only by federal intervention at the outset of the prosecution.

## III.

**Defendants' Removal Petition Was Not Deficient as a Pleading.**

If defendants are correct in the view they take of either §1443(1) or §1443(2), their prosecutions are removable on a showing, without more, that they are being prosecuted for attempting to exercise their rights to equal public accommodations under the Civil Rights Act of 1964. This requires that they allege (and prove if the allegations are contested)[168] that they are being prosecuted (a) for trespass for refusing to leave (b) establishments covered by the public accommodations title of the Civil Rights Act of 1964, (c) where they were excluded and consequently prosecuted by reason of race.[169]

The petition adequately alleges these three elements. It states that the defendants have been indicted under, and are presently charged with violations of, GA. CODE ANN.

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[168] Defendants take pp. 47-50 of Georgia's Brief to mean that no hearing was required on the present removal petition because the facts alleged were insufficient if true to support removal—just as, in a civil action, a complaint may be dismissed without evidentiary hearing for failure to state a claim within the jurisdiction of the court. It is hard to conceive that Georgia is asserting also the converse of this proposition: that if the allegations are sufficient they are not subject to denial and removal is allowed without inquiry into their truth where disputed. Defendants would be advantaged by such a rule in this case, but hardly think themselves entitled to it. Rather, it seems obvious that controversies as to facts pertinent to removability must be in some manner resolved by the district court, whether on affidavit, evidentiary hearing or other method of trying facts.

[169] All of the other sorts of allegations which Georgia says defendants' removal petition lacks (Br. 30-31) are immaterial if this Court agrees with defendants' construction of the removal statute.

§26-3005, Georgia's 1960 refusal-to-leave statute (R. 1-4). It states that defendant Rachel and some of the other defendants "were arrested . . . when they sought to obtain service, food, entertainment and comfort at Lebco, Inc., d/b/a Leb's, a privately owned restaurant opened to the general public, 66 Luckie Street, Atlanta, Fulton County, Georgia" (R. 2). Similarly, for each defendant other than Rachel and his companions, the petition states that he or she was arrested while seeking service at a named restaurant, cafeteria or hotel, opened to the general public (R. 2-3). A street location which the district court could notice was in downtown Atlanta was given for each establishment except the Henry Grady Hotel, and that was alleged to be "built on real estate owned by the State of Georgia but leased for a term of years to the H. & G. Hotel Corporation." (*Ibid.*) These arrests "were effected for the sole purpose of aiding, abetting and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the white or Caucasian race" (R. 1). And "the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination" (R. 4).

Trespass prosecutions for refusal to leave restaurants at which the defendants were refused service on account of race are plainly alleged.[179] The only regard in which the

[179] Georgia contends at Br. 41-42 that the allegation that "Members of the so-called white or Caucasian race are similarly treated [i.e., treated as are Negroes] and discriminated against when accompanied by members of the Negro race" (R. 1-2) is in effect

allegations might be challenged relates to their sufficiency in alleging coverage of the restaurants by the public accommotions title of the 1964 act. Failure in terms to allege coverage is not surprising, of course, inasmuch as the petition predated the 1964 act; and if the facts set forth did not sufficiently allege coverage, the supervention of the act would plainly warrant this Court's remand of the case to the district court to permit amendment. 28 U. S. C. §2106 (1964); cf. *Maryland* v. *Soper* (No. 1), 270 U. S. 9, 36 (1926). But the facts appear sufficient. It is incredible to suppose that any restaurant in downtown Atlanta, opened to the general public, is not one which "serves or offers to serve interstate travelers," within sections 201(b)(2), (c)(2) of the act. See *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 309-310 (1964). Additionally, the allegations that defendants were arrested for the sole purpose of aiding customs of racial discrimination and that the State of Georgia supports and maintains a policy of racial discrimination bring the case within sections 201(b), (d)(2), as one in which discrimination "is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof"—particularly as to the Henry Grady Hotel, which is alleged to occupy state-owned land. If Georgia seriously disputes coverage in this Court, defendants would not object to the Court's leaving the matter for amendment and hearing on the remand ordered by the court of appeals. See Part IV *infra*. If not, the matter seems an academic quibble.

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an allegation that Negroes and whites are similarly treated in Atlanta. This is bizarre. Defendants think it indisputable that a white man excluded from a covered establishment on the sole ground that he is accompanied by a Negro is thereby discriminated against "on the ground of race" within section 201(a) of the Civil Rights Act of 1964.

Under 28 U. S. C. §1446(a) (1964), a removal petition is required to contain "a short and plain statement of the facts which entitle [the petitioner] . . . to removal." This provision, enacted in the 1948 Judicial Code revision to unify and simplify the statutory provisions theretofore governing procedure in invoking the various heads of federal removal jurisdiction, adopts the practical and non-technical approach to pleading previously taken by this Court in promulgating FED. RULE CIV. PRO. 8(a).[171] Pre-1948 decisions requiring great specificity and detail in criminal removal petitions under the old statutes, see *Maryland* v. *Soper* (No. 1), 270 U. S. 9 (1926); *Colorado* v. *Symes*, 286 U. S. 510 (1932), have no application under §1446(a), which governs alike civil and criminal cases.[172] Given the few, simple facts required to sustain removal under proper construction of §1443, defendants' petition would probably pass muster even under the old pleading requirements. Under present §1446(a), the sufficiency of the petition should be clear.

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[171] In pertinent part, FED. RULE CIV. PRO. 8(a), promulgated by this Court to take effect in 1938, provided (and still provides): "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled."

[172] The statute under which *Soper* and *Symes* were decided, Judicial Code of 1911, ch. 231, §33, 36 Stat. 1097, as amended by Act of August 23, 1916, ch. 399, 39 Stat. 532-533, 28 U. S. C. §76 (1940), provided in pertinent part: "Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney . . . stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court . . . ."

## IV.

**The Court of Appeals' Directions Governing Hearing on Remand Were Proper.**

Under proper construction of 28 U. S. C. §1443, Georgia's contention that the court of appeals should have directed the district court on remand to inquire whether the "Georgia Courts will not apply *Hamm* fairly" (Br. 52) must be rejected. Fairness of the state courts in entertaining defendants' federal claim is not in issue. See p. 103 *supra*.

There remain Georgia's contentions that the court of appeals should have left open on remand (1) the issue whether the restaurants in which defendants were arrested were covered by the public accommodations title of the Civil Rights Act of 1964, and (2) the issue of "violence or vandalism" by defendants which, Georgia says, would take them out of the protection of *Hamm* (Br. 51-52). As to the first issue, it should be noted that Georgia's brief carefully avoids asserting that there is any real question of coverage of the restaurants. The court of appeals' direction to the district court to try the issues "as to the purpose for the arrests and prosecutions, and in the event it is established that the removal of the [defendants] . . . from the various places of public accommodation was done for racial reasons," to accept jurisdiction (R. 31-32), doubtless uses the phrase "places of public accommodation" in its statutory sense. Therefore, if Georgia should represent to this Court that it seriously means to contest coverage, defendants would have no objection to the Court's making clear in its opinion that it construes the remand direction as leaving the question of coverage open. As for the issue of "violence or vandal-

ism," Georgia misreads the court of appeals' opinion. That court has instructed the district court to inquire whether defendants were excluded from service in the restaurants "for racial reasons." If they were, the question of violence or vandalism is simply not in the case. The Civil Rights Act of 1964, of course, permits a restaurateur to deny service to vandals because they are vandals, and so does the court of appeals' judgment. Neither allows the restaurateur to deny service "for racial reasons." That is properly the issue on remand.

## CONCLUSION

**For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.**

Respectfully submitted,

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## APPENDIX

**Motion for Stay Pending Appeal**
**Filed March 12, 1964**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. .....

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THOMAS RACHEL, et al.,

*Appellants,*

—v.—

THE STATE OF GEORGIA,

*Appellee.*

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Appellants respectfully move this Court for a stay of further proceedings and for a stay of the prosecution of the criminal cases against them presently pending in the Superior Court of Fulton County, Georgia, in the matters individually entitled State of Georgia v. Thomas Rachel, Jerry Walker, Larry Crawford Fox, Debbie Amis, Willie Paul Berrien, Jr., Lynn Pfuhl, Michael Sayer, Julian M. Samstein, Ralph M. Moore, Ronald Franklin Turner, Carl C. Arnold, James F. Thompson, Archer Columbus Black, Carl Vincent Hill, Jeanette Stockton Hume, James Arthur Cherry, Russell C. Campbell, Allen R. Elliott, Anna Jo Weaver, and Charles Edward Wells. These prosecutions should be stayed pending hearing and determination

of petitioners' appeal herein from the order of Judge Boyd Sloan remanding said matters to the aforesaid state court after they had been removed to the United States District Court for the Northern District of Georgia, Atlanta Division.

Appellants respectfully show that some eighteen (18) defendants who are on the same Calendar in the Criminal Division of the Fulton Superior Court and who are charged with the same misdemeanor offense as the appellants, were ordered to show cause before the said trial judge at 9:30 A.M., Thursday, March 12, 1964, as to why their bonds should not be increased and, also, as to why they should not be required to give further surety. Though only one of the appellants had his bond increased from $500.00 to $7,000.00, the appellants stand threatened with the immediate prospect of their bonds being so raised and with their being required to give further security. That should such demands be made upon the appellants, many of them would be required to remain in jail because of their inability to make said bond; also, as a result of such incarceration, the appellants would have the effectiveness of their right to counsel substantially minimized.

Had the Honorable Judge Sloan granted the appellants a hearing prior to remanding the subject cases, appellants would have been able to show facts at the hearing sustaining the allegations of their removal petition sufficiently to justify the exercise of the jurisdiction of the said Court to hear and try the indictments pending in the state court against the appellants.

The matters will be tried in the immediate future by the Honorable Durwood T. Pye, Judge, Fulton Superior Court, unless the proceedings are stayed pending a hearing in this matter, otherwise the issues raised and to be raised herein will become moot.

In view of the fact that criminal prosecutions which appellants seek to stay prevents them from exercising the rights, privileges and immunities of United States citizens under the United States Constitution and Laws, appellants make the following requests in connection with this motion:

A. That the Court by one of its Judges, issue the requested stay forthwith and on the basis of the record herein.

B. If the Court deems it improper to determine this motion by one of its judges that the Court, by a three judge panel, issue the requested stay forthwith and on the basis of the record herein.

C. Whether the Court is to determine this motion by one of its judges or by a three-judge panel, and if the Court is not to determine the motion on the basis of the record herein, that the Court set down the motion for argument on the shortest possible notice that the Court deems proper in the premises, and grant leave to defendants to serve notice of argument on plaintiffs by telephone, telegraph, or any other proper and expeditious means.

To expedite the proceedings a copy of the petition for removal and remand order are attached hereto as exhibits "A" and "B" respectively.

This 12th day of March, 1964.

DONALD L. HOLLOWELL
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JA. 5-8372

## Order and Judgment on Remitter

CASE NUMBER 85028

INDICTMENT FOR MISDEMEANOR

TRUE BILL RETURNED BY THE GRAND JURY
ON JANUARY 28, 1964

FULTON SUPERIOR COURT

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THE STATE

VERSUS

MARDON R. WALKER

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The remitter of the Honorable Supreme Court of Georgia in the above stated case has been filed in the Office of the Clerk of this court, as follows, to-wit:

> This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reason stated in the opinion this day filed.

Accompanying the remitter is said opinion of the Supreme Court of Georgia, as follows, to-wit:

> 22656. MARDON R. WALKER v. THE STATE
>
> MOBLEY, Justice. Whereas the Supreme Court of the United States did by judgment of that court entered on May 24, 1965, reverse the judgment of this court

in *Walker* v. *State,* 220 Ga. 415 (139 SE2d 278), wherein this court had affirmed the judgment of the Superior Court of Fulton County convicting the defendant of a misdemeanor, to-wit, the violation of the anti-trespass law (Ga. L. 1960, p. 142, *Code Ann.* Section 26-3005) of this state, the judgment of this court is vacated and the judgment of the trial court is reversed.

Judgment Reversed. All the Justices Concur.

Upon examination of the decision of the Supreme Court of Georgia reported at 220 *Georgia* 415, it appears that the rulings of this Court denying the plea in abatement were held correct, that it was held that the motion in arrest of judgment raised no question for consideration, and that it was further held that the motion for new trial was properly overruled. It also appears that the Supreme Court of Georgia further ruled, in headnote five of said opinion, as follows, to-wit:

5. This court has no original jurisdiction and is limited to the trial and correction of errors of law from the superior courts and other enumerated courts of this State. *Code Ann.* Section 2-3704. Thus the contention made in the general grounds of the motion for new trial that the enactment into law of the Civil Rights Act of 1964 by the Congress abates defendant's conviction and prevents her punishment for violating the Georgia anti-trespass Act raises no question for consideration by this court, as this question was not raised or passed upon in the trial court.

Upon examination of the decision of the Supreme Court of the United States entered May 24, 1965, reported in

*Supreme Court Reporter,* Volume 85, Number 15, for June 15, 1965, at page 1557, it appears that upon consideration of the petition for certiorari filed in the Supreme Court of the United States to the Supreme Court of Georgia it was ordered by the Supreme Court of the United States that said petition for certiorari be granted and that the judgment of the Supreme Court of Georgia be reversed. It further appears that dissenting from this order were Mr. Justice Stewart, Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice White.

Upon receipt of the aforesaid remitter in this court, said case is now in the following posture: The conviction of defendant, Mardon R. Walker, in this court has been ordered reversed by the Supreme Court of Georgia by reason of the reversal of its affirmance thereof by the Supreme Court of the United States.

The rulings and judgments of the Supreme Court of Georgia and the Supreme Court of the United States do not extend beyond this. No question as to the effect of the Civil Rights Act of 1964 enacted by the Congress has been made by either the Supreme Court of Georgia or the Supreme Court of the United States by any judgment in relation to this case. Indeed, no such ruling could be made for no issue in that regard was before this Court, and the Supreme Court of Georgia was without jurisdiction to pass thereon and the Supreme Court of the United States, likewise, was without jurisdiction as to any such matter which was not in issue in the case.

While previous rulings of the Supreme Court of the United States were cited by the majority of that court in its opinion reversing the decision of the Supreme Court of Georgia, said citations of authority do not constitute rul-

ings or judgments and in no way serve to constitute any adjudication in this case with reference to the aforesaid Civil Rights Act of 1964 enacted by the Congress of the United States in that year.

The case thus before this Court is simply one in which the conviction of defendant, Mardon R. Walker, under the indictment against her in this court has been set aside and reversed, and the result is that the case stands for trial upon said indictment de novo in this court.

It is, therefore, considered, ordered, and adjudged by the Court that the aforesaid conviction of Mardon R. Walker be, and the same is hereby set aside, and a new trial is granted her upon said indictment.

This, the 28th day of July, 1965.

DURWOOD T. PYE
Judge, Superior Court
Atlanta Judicial Circuit